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Supreme Court of the United States

OCTOBER TERM, 1951

No. 458

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL., PETITIONERS,

vs.

SIMON L. HOWARD, SR., AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 3, 1951

CERTIORARI GRANTED MARCH 3, 1952

United States Court of Appeals,

EIGHTH CIRCUIT.

No. 13,899.

CIVIL.

SIMON L. HOWARD, SR.,
APPELLANT,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND C. O. CARNAHAN, GENERAL CHAIRMAN BROTHERHOOD OF RAILROAD TRAINMEN, APPELLEES.

No. 13,900.

CIVIL.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, APPELLANT,

vs.

SIMON L. HOWARD, SR., BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND C. O. CARNAHAN, GENERAL CHAIRMAN BROTHERHOOD OF RAILROAD TRAINMEN, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Print
Plaintiff's complaint—bill in equity	1
Temporary restraining order	8
Joint answer of defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, debtor, and St. Louis, San Francisco and Texas Railway Company, a corporation, to plaintiff's complaint	10

Print

Separate answer of C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen 12
Separate answer of Brotherhood of Railroad Trainmen, memorandum as to 14
Transcript of testimony 15
Caption in U. S. District Court 15
Appearances 15
Plaintiff's opening statement 16
Plaintiff's case 18
Simon L. Howard, Sr. 18
Plaintiff's exhibits:
1, Notice to brakemen, dated March 28, 1946 43
2, Notice to brakemen, dated March 28, 1946 43
3, Notice to brakemen, dated March 25, 1946 44
4, Notice to train porters, dated March 19, 1946 45
5, Questionnaire, dated May 4, 1943 46
6, Notice to train porters, dated March 25, 1946 49
7, Notice to passenger brakemen, dated March 25, 1946 50
8, Letter dated March 30, 1946, to Wentworth Starks, from A. M. Malgren 51
9, Notice to trainmen and yardmen 51
10, Notice to porters and brakemen, dated April 11, 1946 53
11, Western Union light letter to A. F. Whitney et al., from James M. Tillman et al. 53
12, Deposition of Frank W. Morey 55
Morey Exhibit A, Memorandum of understanding for and duties under an agreement made between the Four Train Service Organizations and the St. Louis-San Francisco Railway Company 59
13, Joint report of General Committees of O. R. C., B. of R. T., B. of L. E. and B. of L. F. E. 83
J. M. Tillman 84
Plaintiff's Exhibit 1, Rules of Transportation Department, Frisco Railway 85
Brotherhood Exhibit 2, Trainmen's schedule 89
Carriers' Exhibit A, Letter from Simon Howard to P. Q. Woods. 93
C. P. King 94
Plaintiff's exhibits:
15, Letter marked "personal" from J. M. Kurn to Messrs. Higgins and Carr, dated June 4, 1918 95
16, Letter to J. M. Kurn from E. E. McGuire, dated September 26, 1919 97
17, Letter to J. S. Pyeatt signed by J. M. Kurn, dated October 6, 1919 99
18, Letter to J. M. Kurn from J. E. Hutchison, dated August 12, 1921 101
19, Memo to T. A. Hamilton dated August 21, 1921 103
20, Letter to J. E. Hutchison from J. M. Kurn, dated August 17, 1921 104
21, Letter to C. H. Baltzell from J. E. Hutchison, dated September 18, 1926 105
22, Letter signed by J. E. Hutchison, dated March 15, 1928 .. 107
23, Letter to J. M. Kurn, dated April 7, 1928 109
24, Letter from Mr. Kurn, dated April 11, 1928 109
27, Letter to J. E. Hutchison from F. H. Shaffer, dated April 18, 1928 110
25, Letter signed by Limit Brown to J. E. Hutchison, dated April 4, 1928 111
26, Letter to J. E. Hutchison from F. H. Shaffer, dated April 18, 1928 111
28, Letter from J. E. Hutchison to Limit Brown, dated April 19, 1928 112

Print

29, Letter from Limit Brown to J. E. Hutchison, dated May 17, 1928 112
30, Letter from Mr. Hutchison to Mr. Brown, dated May 22, 1928 114
31, Letter to J. E. Hutchison from Limit Brown, dated June 23, 1928 114
32, Letter from Mr. Hutchison to Mr Shaffer, dated August 7, 1929 116
33, Letter from Jim Judge to J. E. Hutchison, dated August 6, 1929 117
34, Letter from C. P. King to C. A. Rutherford et al., dated March 10, 1944 118
35, Letter dated March 21, 1944 119
36, Letter from C. O. Carnahan to G. H. Jury, dated March 12, 1943 120
37, Letter from C. O. Carnahan to C. P. King, dated December 1, 1944 121
38, Letter from L. B. Clary to C. P. King, dated December 14, 1944 122
39, Official ballot, December 21, 1945 124
40, Letter attached to official ballot 126
41, Letter from C. O. Carnahan to C. P. King, dated January 3, 1946 127
42, Memorandum entered into on March 7, 1946, with B. of R. T. 130
43, Supplement No. 12 to General Order No. 27 137
45, Decision No. 2181 of United States Railroad Labor Board, rendered March 5, 1924, Docket 773 139
44, Letter of March 9, 1946, signed by C. P. King 157
46, Telegram to L. W. Fairchild from C. P. King, dated March 20, 1946 158
47, Deposition of T. S. McFarland 161
Defendant Brotherhood's exhibits:
3, Opinion of Attorney General, memorandum as to 185
4, Circular No. 1 of the National Railroad Adjustment Board, memorandum as to 186
Defendants' case 186
C. P. King 187
Defendant Carriers' exhibits:
B, Agreement between J. M. Kurn and Frank A. Thompson, Trustees, St. Louis-San Francisco Railway Company, debtor, and Train Porters and Chair Car Porters, represented by Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., excerpts therefrom.. 190
C, Official ballot 193
D, Letter from C. O. Carnahan to C. P. King, dated January 3, 1946 196
E, Telegram to H. L. Worman from Robert F. Cole, dated January 5, 1946 198
F, Motion for leave to intervene in the proceeding before the Emergency Board, together with proposed intervening petition 200, 201
G, Motion of Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees to reconsider its motion to intervene in this proceeding before the Emergency Board 206
H, Report to the President by Emergency Board 212
I, Letter to C. P. King from C. O. Carnahan, dated February 22, 1946 220
J, Letter to E. E. Oster and C. O. Carnahan from C. P. King, dated March 7, 1946 222

Print

K, Letter to L. W. Fairchild et al. from C. P. King, dated March 9, 1946 224
L, Letter to L. W. Fairchild et al. from C. P. King, dated March 12, 1946 225
Brotherhood's Exhibit 9, Memorandum under date of August 3, 1918 227
Carriers' Exhibit B-3, Agreement 232
Plaintiff's exhibits:
49, Letter dated October 27, 1936, to F. H. Shaffer from F. W. Morey 234
48, Letter dated November 12, 1936, to F. W. Morey from F. H. Shaffer 235
J. A. Rash 237
Brotherhood's exhibits:
10, Deposition of Robert F. Cole 246
1, Seniority roster 258
2, Train schedule 258
5, 6, 7, 8, Awards of National Railroad Adjustment Board, First Division 259
9, Memorandum of G. H. Schleyer and J. E. Hutchison to J. M. Kurn, dated August 3, 1918 259
Plaintiff's rebuttal testimony 262
C. O. Carnahan 262
C. P. King 264
Memorandum opinion of the Court 267
Findings of fact 283
Conclusions of law 288
Order of August 18, 1948, restraining Carrier, etc. 289
Motion of plaintiff for new trial, containing exceptions to findings, conclusions, judgment and order 290
Motion of defendant Carriers to amend findings and order and for new trial 296
Statement of reasons in support of motion of defendant Carriers to amend findings and order for new trial 300
Transcript of Hearing on Plaintiff's Motion for New Trial, Containing Exceptions to Findings, Conclusions, Judgment and Order, and Motion of Defendant Carriers to Amend Finding and Order and for New Trial 303
Appearances 303
Proceedings 303
Statement by counsel for plaintiff 303
Statement by the Court 317
Motions of plaintiff and defendant overruled 328
Notice of appeal by St. Louis-San Francisco Railway Company, defendant 329
Notice of appeal by plaintiff 329
Designation of record by plaintiff 330
Designation of record by St. Louis-San Francisco Railway Company, defendant 332

Proceedings in U. S. Court of Appeals 334 334
Appearance of Mr. Victor Packman, Mr. Henry D. Espy and Mr. Chas. H. Houston as Counsel for Appellant in Cause No 13899 ..... 334 334
Appearance of Mr. Joseph C. Waddy as Counsel for Appellant in Cause No. 13899 ..... 334 334
Appearance of Mr. M. G. Roberts and Mr. Alvin J. Baumann as Counsel for Appellees in Cause No. 13899 ..... 335 335
Appearance of Mr. W. Donald Dubail and Mr. Charles R. Judge as Counsel for Appellees Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, in Cause No. 13899 335 335

	Original	Print
Appearance of Counsel for Appellant in Cause No. 13900	336	335
Appearance of Mr. Charles H. Houston as Counsel for Appellees in Cause No. 13900	336	336
Appearance of Mr. W. Donald Dubail and Mr. Charles R. Judge as Counsel for Appellees Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, in Cause No. 13900	337	336
Appearance of Mr. Joseph C. Waddy as Counsel for Appellee Simon L. Howard, Sr., in Cause No. 13900	337	336
Order of Submission in Causes No. 13899 and 13900	338	337
Order vacating Submission in Causes Nos. 13899 and 13900	339	337
Order of Submission in Causes Nos. 13899 and 13900	340	338
Opinion in Causes Nos. 13899 and 13900	341	338
Judgment in Causes Nos. 13899 and 13900	356	352
Order Staying Issuance of Mandate in Causes Nos. 13899 and 13900	358	353
Clerk's Certificate to Transcript	359	354
Order allowing certiorari	360	355

Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, before the Honorable John B. Sanborn, the Honorable Harvey M. Johnsen, and the Honorable Walter G. Riddick, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Court
(Seal) of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 3rd day of January, A. D., 1949, appeals from the United States District Court for the Eastern District of Missouri, were filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in certain causes wherein Simon L. Howard, Sr., was Appellant, and St. Louis-San Francisco Railway Company, a Corporation, Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, were Appellees, and St. Louis-San Francisco Railway Company, a Corporation, was Appellant, and Simon L. Howard, Sr., Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, ware Appellees.

Printed record on which the appeals were heard in the United States Court of Appeals for the Eighth Circuit was filed on April 8, 1949, and is in the words and figures following, to-wit:

Plaintiff's Complaint.

In the District Court of the United States,
In and for the Eastern Division of the
Eastern Judicial District of Missouri.

Simon L. Howard, Sr.,
Plaintiff,

vs.

Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor,

and

St. Louis-San Francisco & Texas Railway Co., a corporation,

and

Brotherhood of Railroad Trainmen, an unincorporated association,

and

C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,
Defendants.

Cause No. 4452.
Div. No. 2.
Bill in Equity.

1. Jurisdiction of this court is invoked under Title 28, Section 41 (8), U. S. C. A., as the matters to be adjudicated under a law regulating commerce, namely, the Railway Labor Act (See Tunstall v. Brotherhood of Locomotive F. & E., 89 Law Ed. 181, 183, decided by the Supreme Court of the United States, December 18, 1944).

2. Now comes plaintiff, Simon L. Howard, Sr., a (negro) citizen of the United States, and for his cause of action states that Frank A. Thompson is now and has been at all material times herein detailed the duly appointed, qualified and acting Trustee of the St. Louis-San Francisco Railway Company, a Missouri corporation, Debtor (under

the supervision and direction of Hon. George H. Moore, United States District Judge for the Eastern Division of the Eastern Judicial District of Missouri); that a subsidiary of said railway company is the St. Louis-San Francisco & Texas Railway Company, a Texas corporation under the management of the parent company, and that both railroads are engaged in interstate commerce, with offices in St. Louis, Missouri.

3. That the Brotherhood of Railroad Trainmen is the name adopted by an unincorporated association of railroad Trainmen whose membership is restricted to "white" men; that it has an office in Springfield, Missouri, with headquarters there for a General Chairman of the defendants' employees named C. O. Carnahan; that said organization has a national membership of over 100,000 members, and it is physically impossible and impracticable for the plaintiff to join its innumerable members as parties defendant herein; that said organization has directing officers, including the above named General Chairman, who act in contract matters and in litigation for the membership as a whole.

4. Plaintiff states that the Brotherhood of Railroad Trainmen represents the majority of the Brakemen employed by the aforesaid defendant railways, and as such is the representative under the Railway Labor Act (Title 45, U. S. C. A., P. 152, Fourth) of the entire craft performing Brakemen's duties for purposes of collective bargaining as provided by the Railway Labor Act; that the said Railroad Brotherhood is required by law in making contracts with carriers to represent non-union or minority union members of the craft without hostile discrimination, with fairness, impartiality and in good faith. Also to give reasonable notice and opportunity to be heard to parties in interest and an opportunity to vote on any proposed action affecting said employees before consummating agreements in their behalf or adverse to their interests.

5. Plaintiff states that he was first employed by the defendant railways some thirty-two years ago, as a Freight Brakeman, and on or about January, 1918, he was reassigned to passenger runs as a trainman with the "title"

of "Train Porter"; that he has continuously held said job, performing it with loyalty to his employer and with fidelity to the rules of the company and his duties; that his duties as a Train Porter and of other negro Trainmen called "Train Porters" and employed by the defendant railroads were openly known for the past 50 years to embrace those of ordinary Brakemen. However, Train Porters without extra pay were required on occasion to clean cars in transit and do other tasks for the comfort and accommodation of passengers.

6. Plaintiff states that he is married and the father of five children, and at the present time is 54 years of age; that in recent years his monthly income including overtime has been $180.00 per month; that he considers his employment his most valuable property right, and if he were to lose his job he would suffer irreparable injury and damage; that his job is the source of support and education to some of his children and a means of a livelihood for his wife and self; that the plaintiff and approximately 100 other negro Trainmen working or subject to call for the defendant railroads under the "badge" of Train Porters have as a result of their many years of employment earned valuable seniority, retirement and disability rights over new employees which plaintiff and others similarly situated deem worthy of preservation.

7. Plaintiff states that the defendant railroads and the Brotherhood of Railroad Trainmen acting through C. O. Carnahan, its General Chairman, secretly and without advance notice to Negro Trainmen performing the work of Brakemen for the defendant railroads, entered into an agreement at Springfield, Missouri, on the 7th day of March, 1946, wherein the defendant railroads agreed in effect to discharge all of its negro Brakemen effective April 1, 1946, and to replace said Brakemen with members of the Brotherhood of Railroad Trainmen. That said agreement was negotiated by the Brotherhood of Railroad Trainmen in disregard of its fiduciary and statutory obligation to plaintiff and other negro Trainmen by virtue of its alleged authority to act for employees under the Railway Labor Act. That said Brotherhood did not exert or attempt to use its representative bargaining strength for the purpose

of uplifting the pay base of negro Trainmen, but for years has used its influence and weight to insist on the displacement of negro Trainmen for the advantage and benefit of white men who were members of or eligible for membership in the Brotherhood, and who have and could pay dues to said organization. That its motives were not economic uplift for the plaintiff and other negro Trainmen as faithful representatives, but along discriminating and unfair lines.

8. Pursuant to said understanding the defendant railroads caused notice to be served on the plaintiff and all other Train Porters that their positions were being discontinued, and that they should turn in their switch keys and coach keys on April 1st or as soon thereafter as possible. However, investigation reveals that the tasks heretofore performed by plaintiff and other Train Porters as Brakemen have not been discontinued, but are to be performed by newly assigned Brakemen and newly hired Brakemen who will do less work for more pay. The rate of pay for white baggage Brakemen is fixed at a minimum of $213.00 per month on mileage not exceeding 4500 miles per month, with a mileage average allotment at the rate of $.0462 per mile over *4500* miles, whereas for similar work (plus Porter tasks on occasion) a Train Porter receives $169.40 per month on mileage not exceeding 5500 miles per month, with a mileage overage at the rate of only $.0286 per mile over *5500* miles. On passenger trains a white Brakeman's monthly pay is fixed at $207.90 per month instead of $213.00 per month, with all other conditions the same. It can readily be computed that a white Brakeman traveling 5500 miles per month would receive $259.20 for baggage Brakeman work and on other runs $254.10, whereas a negro Brakeman designated as a "Train Porter" receives from $65.00 to $90.00 per month less for doing the same job plus other work.

9. Plaintiff has been informed that the white Brakemen who are to take over their Brakemen duties will do no Porter work, and that train service will suffer from lack of performance of tasks heretofore done by train Porters; that the extra overhead to the defendant railroads involved in the change of Brakemen of one color for another

is estimated to be approximately $100,000.00 per year, while at the same time public service on the railroads will be immeasurably reduced and adversely affected to the detriment of the passengers of the railroad and requirements of public health.

10. Plaintiff states that the Brotherhood of Railroad Trainmen in coercing the agreement aforesaid violated its statutory obligations to the negro Brakemen in favor of white Brakemen who were and may be members of its organization (and dues payers) and that it and its members, present and prospective, should be prevented from obtaining the benefits of such illegal and discriminatory action contrary to the constitutional rights of the plaintiff and others similarly situated; that the defendant railroads are not bound by or entitled to take the benefit (or in reality detriment) of a contract which the bargaining representative for the Brakemen was prohibited by the Railway Labor Act from making. (See Steele vs. Louisville & Nashville R. R. Co., 89 Law Ed. 172, 178, decided by the Supreme Court of the United States December 18, 1944.)

11. Plaintiff states that he is bringing this action in his own behalf and as a class suit in behalf of all other negro Trainmen [o] the said railroads who have also received notice that their services have been discontinued effective April 1, 1946, resulting from the illegal agreement entered into between the railroads and Brotherhood of Railroad Trainmen above mentioned; that they are so numerous it is impracticable to bring them all before the court as parties, but they all have a common grievance arising out of common questions of law and fact affecting the rights of all of them, and that they seek common relief against the defendants as hereinafter detailed, and all of them will suffer irreparable injury and loss and property rights unless this court grants the relief herein sought.

12. Plaintiff states that he together with a number of other negro trainmen who have been notified that their services would not be required after April 1, 1946, as aforesaid, requested the defendants to set aside their agreement of March 7, 1946, and to give thirty (30) days notice of intended change affecting working conditions

as a preliminary to negotiation as provided by Section 6 of the Railway Labor Act, and the defendant railroads were requested to withdraw the notice of termination effective April 1, 1946, but the defendants have failed and refused to accede to the appeals and entreaties of the plaintiff and others similarly situated, and the defendant railroads intend to carry out the agreement.

13. Plaintiff states that he and others similarly situated have no administrative or statutory remedies to maintain the status quo of their jobs or their seniority, disability and retirement rights or to prevent their economic displacement, and no adequate remedies at law; that only a Court of Equity can protect the civil rights of the plaintiff and of the others in whose behalf this suit is brought, and to prevent acts prejudicial to the public interest.

14. That the matters and things hereinabove complained of constitute an actual controversy between plaintiff individually and as a representative of other negro Trainmen of the defendant railroads as a class with the defendants.

Wherefore, the premises considered, plaintiff prays in behalf of himself and others similarly situated:

1. That the defendant railroads be permanently enjoined from discontinuing the jobs known as Train Porters and from discharging plaintiff and other Train Porters employed by them on April 1, 1946, or any other date, by virtue of the agreement entered into with the Brotherhood of Railroad Trainmen on March 7, 1946, and enjoined from hiring white Brakemen to replace or displace plaintiff and other Train Porters as planned in accordance with said agreement.

2. That the defendant railroads pending a full hearing on the merits of this Bill in Equity be temporarily restrained from discontinuing the jobs known as Train Porters and from discharging plaintiff and other Train Porters employed by them on April 1, 1946, or any other date by virtue of the agreement entered into with the Brotherhood of Railroad Trainmen on March 7, 1946, and restrained from hiring white Brakemen to replace or displace plaintiff and other Train Porters as planned in accordance with said agreement.

3. That the defendant Brotherhood of Railroad Trainmen and its members, present and prospective, be enjoined from obtaining the benefits of the agreement negotiated with the railroads on March 7, 1946, and from taking over the jobs of the plaintiff and of other Train Porters under said agreement or under any similar agreement or conspiracy to deprive citizens of the United States of their right to a livelihood because of their race or color.

4. That temporary injunctions should be issued against the defendants after due notice and opportunity to be heard pending the final hearing on the merits enjoining and restraining them from carrying out the agreement of March 7, 1946, in reference to replacing negro Trainmen with white Brakemen and from entering into any new agreements to accomplish the same result by indirection, or at some future date prior to the determination of this cause on its merits.

5. That the Court adjudge and decree the agreement of March 7, 1946, to be void and against public policy and in contravention of the rights of the negro Trainmen of the defendant railroads and prejudicial to the public interest.

6. That the Court adjudge and decree, that any agreements between the defendant railroads and the Brotherhood of Railroad Trainmen in which the said Brotherhood of Railroad Trainmen may discriminate openly or covertly in protecting the rights of employees because of their race or ineligibility for membership in the Brotherhood of Railroad Trainmen, are void and against public policy.

7. That the Court adjudge and decree that the notice to negro Trainmen that their positions as Train Porters were being discontinued effective April 1, 1946, constituted a breach of obligation owed by the railroads to its employees to give at least 30 days notice under Section 6 of the Railway Labor Act.

8. That process be ordered issued in this cause, whenever necessary, to be served on the defendants Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, by and through the Marshal of the U. S. District Court for the Western District, Southern Division

of Missouri, at Springfield, Missouri, where said defendants maintain an office and may be served.

VICTOR PACKMAN,
1096 Arcade Building,
St. Louis, Missouri,
HENRY D. ESPY,
2103a Market Street,
St. Louis, Missouri,
Attorneys for Plaintiff.

St. Louis, Missouri
City of St. Louis } ss.

Simon L. Howard, Sr., being duly sworn upon his oath states that the matters of fact set forth in the foregoing Bill In Equity are true to the best of his knowledge, information and belief, and that the suit is being filed in sincerity for the reasons set forth therein.

SIMON L. HOWARD, SR.

Subscribed and sworn to before me this 28th day of March, 1946.

SARAH MORRISON,
Notary Public.

(Seal)

My commission expires: Dec. 23, 1946.

Temporary Restraining Order.

By consent of plaintiff and of the defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis-San Francisco & Texas Railway Co., a corporation, application for temporary Restraining Order of the plaintiff was submitted to the undersigned District Judge in the absence of the Judge of Division No. 2, Hon. Richard M. Duncan.

It appearing to the Court from the verified petition that the plaintiff and others similarly situated for whom the action was brought should have the benefit of a temporary Restraining Order against the above named defendants in order to safeguard their rights and prevent irreparable loss and damage to them and acts prejudicial to the public

interest based on alleged violations of the Railway Labor Act (after giving said defendants who had due notice of this hearing an opportunity to be heard) does herewith order that a Temporary Restraining Order be issued directed against the defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis-San Francisco & Texas Railway Co., a corporation, enjoining and restraining said defendants from putting into operation the agreement entered into on the 7th day of March, 1946, with the Brotherhood of Railroad Trainmen requiring the discontinuance of Train Porter positions effective April 1, 1946, and enjoining and restraining said defendants from replacing plaintiff and other negro Trainmen known as Train Porters with white Brakemen as planned and agreed with the Brotherhood of Railroad Trainmen, and the aforesaid defendants are ordered to withdraw the notice issued to plaintiff and other negro Trainmen to the effect that their services as Train Porters were being terminated effective April 1, 1946, or from taking away from Train Porters their presently assigned tasks pursuant to the said agreement made on the 7th day of March, 1946, until further order of this Court.

This order is conditioned upon the furnishing of security by the plaintiff in the amount of $300.00 cash security or bond, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

GEO. H. MOORE,
District Judge.

March 29, 1946.

Endorsed: "Filed March 29, 1946. Jas. J. O'Connor, Clerk."

A True Copy. Certified this 29th day of March, 1946.

JAMES J. O'CONNOR, Clerk,
By ANNICE W. KINDER,
Deputy.

(Seal)

Cash ($300.00) in Lieu of Bond Deposited This Day.

Joint Answer of Defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a Corporation, Debtor, and St. Louis, San Francisco and Texas Railway Company, a Corporation, to Plaintiff's Complaint.

Come now defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis, San Francisco and Texas Railway Company, a corporation, and for their joint answer to plaintiff's complaint filed herein state:

First Defense.

The complaint fails to state a claim against these defendants upon which relief can be granted.

Second Defense.

1. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 1 of the complaint.

2. These defendants admit that defendant Frank A. Thompson is now and has been at all material times detailed in the complaint the duly appointed, qualified and acting Trustee of St. Louis-San Francisco Railway Company, a Missouri corporation, Debtor; and that defendant St. Louis, San Francisco and Texas Railway Company is a Texas corporation; and that both of said defendants are engaged in interstate commerce. These defendants deny all the remaining averments contained in paragraph 2 of the complaint.

3. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 3 of the complaint.

4. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 4 of the complaint.

5. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 5 of the complaint.

6. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 6 of the complaint.

7. These defendants deny the averments contained in the first sentence of paragraph 7 of the complaint. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 7 of the complaint.

8. These defendants deny the averments contained in paragraph 8 of the complaint.

9. These defendants deny the averments contained in paragraph 9 of the complaint.

10. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 10 of the complaint.

11. These defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 11 of the complaint.

12. These defendants deny the averments contained in paragraph 12 of the complaint.

13. These defendants deny the averments contained in paragraph 13 of the complaint.

14. These defendants deny the averments contained in paragraph 14 of the complaint.

Wherefore, having fully answered, these defendants pray to be hence discharged with their costs herein expended.

M. G. ROBERTS,
A. P. STEWART,
A. J. BAUMANN,
S. G. RAY,
Attorneys for defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor, and St. Louis, San Francisco and Texas Railway Company,
906 Olive Street,
St. Louis, Missouri.

Separate Answer of C. O. Carnahan, General Chairman Brotherhood of Railroad Trainmen.

1. Comes now Defendant and for answer to Plaintiff's complaint states that this Court is without jurisdiction in the premises, Plaintiff's remedy, if any, being exclusively provided by the Railway Labor Act (Title 45 USCA, sec. 151 et seq; Order of Railway Conductors v. Pitney, 90 L. Ed. (Adv. Op.) 279; Switchmen's Union Etc. v. National Mediation Board, 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95; General Committee Etc. v. MKT RR Co., 320 U. S. 323, 88 L. Ed. 76, 64 S. Ct. 146; General Committee Etc. v. Southern Pac. Co., 320 U. S. 338, 88 L. Ed. 85, 64 S. Ct. 142).

2. Defendant admits the allegations of paragraphs 2, 3, and 12 of Plaintiff's complaint, admits that it represents the majority of the class or craft of "Brakemen" employed by the defendant railroads and is accordingly the representative of that entire class or craft; further admits that plaintiff is employed by defendant railroad as a "Train Porter" and that on March 7, 1946, the Defendant Brotherhood of Railroad Trainmen, acting through this Defendant, entered into an agreement with the Defendant railroads, and this Defendant denies each and every other allegation in said complaint contained.

3. For further answer this Defendant states that Plaintiff is a member of the class or craft of "Train Porters" whose duties are well defined and recognized by the administrative agencies created by the Railway Labor Act. That the duties of a "Train Porter" do not include the duties of a member of the class or craft of "Brakemen", and if Plaintiff as a "Train Porter" has been performing the duties of a "Brakeman", as alleged, this performance has been in violation of the rights of the members of the class or craft of "Brakemen" represented by the Defendant Brotherhood, as has been repeatedly determined by awards of the National Railroad Adjustment Board acting pursuant to the powers granted it by the Railway Labor Act. That Plaintiff has not acquired any seriority rights as a "Brakeman", such seniority as he has earned being solely as a "Train Porter", and that the incidental performance of some of the duties of a "Brakeman" by a

member of the class or craft of "Train Porters", without right, and in violation of the rights of brakemen, and without seniority rights therefor, does not and cannot constitute him a member of the class or craft of "Brakemen".

4. Defendant states that the class or craft of "Train Porters" to which Plaintiff belongs, has, in accordance with the provisions of the Railway Labor Act, designated as its representative for the purposes of collective bargaining, the Brotherhood of Trainmen, Porters, Switchmen, Firemen and Railway Employees, Incorporated. That on or about the 2nd day of February, 1944, an agreement was negotiated with the Defendant railroads relating to "Train Porters" and "Chair car Porters", providing among other things for rates of pay and seniority rights of this class or craft. In accordance with the provisions of the Railway Labor Act, the exclusive right of representation of the class or craft of "Train Porters" and all the individual members thereof, is vested in the representative of that class or craft and Defendant states that by reason thereof, the Plaintiff is without right to maintain this action either for himself or as a class suit.

5. Defendant states that on the 7th day of March, 1946, the Defendant Brotherhood of Railroad Trainmen, acting through this Defendant as General Chairman, entered into an agreement with the Defendant railroads, intended to terminate a long standing dispute with said railroads, involving among other things, the performance of brakemen's duties by persons without seniority as brakemen. This agreement did not provide nor was it intended to provide for the discharge of Plaintiff or any of the class or craft to which he belongs, but it provided only that train porters would no longer be permitted to perform work generally recognized as brakemen's duties. Defendant states that it is not the intention of "Brakemen", nor was it provided in said agreement to perform the duties rightfully belonging to the class or craft of "Train Porters", nor in any way to encroach upon the rights of that craft, but it was the intention of said agreement solely to prevent the continued encroachment upon the rights of brakemen by the class or craft of "Train Porters".

6. Defendant further states that the Defendant Brotherhood, in its representation of the class or craft of "Brakemen" and in its negotiating the aforesaid agreement, has in no way discriminated against negroes of that class or craft: Defendant states that there are numerous members of the class or craft of "Brakemen" employed by Defendant railroads who are not members of the Defendant Brotherhood, and that some of these are negroes; the Defendant Brotherhood in its representation of the class or craft of "Brakemen" has at all times fulfilled its obligations to represent the entire class or craft and to avoid discriminating against non-members. The agreement of March 7, 1946, in providing that brakemen's duties shall be performed only by those holding seniority as brakemen, benefits equally the entire class or craft of brakemen, without regard to race or membership in the Defendant Brotherhood.

7. Wherefore, Defendant prays judgment against Plaintiff dismissing Plaintiff's complaint and for his costs and disbursements herein.

W. DONALD DUBAIL,
CHARLES R. JUDGE,
Attorneys for Defendant,
317 N. 11th St.,
St. Louis 1, Mo.

Separate Answer of Brotherhood of Railroad Trainmen.

(The separate answer of Brotherhood of Railroad Trainmen was similar in substance to Separate Answer of C. O. Carnahan.)

Transcript of Testimony.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Simon L. Howard, Sr.,
Plaintiff,

vs.

Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor,

and

St. Louis-San Francisco & Texas Railway Co., a corporation,

and

Brotherhood of Railroad Trainmen, an unincorporated association,

and

C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,
Defendants.

Cause No. 4452
Division No. 2

Be It Remembered, that on Monday, the 14th day of October, 1946, the above entitled cause came on regularly for hearing before the Honorable Richard M. Duncan, District Judge.

The Plaintiff was represented by Mr. Victor Packman and Mr. Henry D. Espy of St. Louis, Missouri, and Mr. Charles H. Houston of Washington, D. C.

The Defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, and St. Louis-San Francisco & Texas Railway Co., were represented by Mr. A. P. Stewart, Mr. A. J. Baumann and Mr. S. J. Ray of St. Louis, Missouri.

The Defendants Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, were represented by Mr. Charles R. Judge and W. Donald Dubail of St. Louis, Missouri.

Whereupon, the following proceedings were had and entered of record:

The Court: Are the parties ready?

Mr. Packman: Plaintiff is ready.

Mr. Judge: Brotherhood is ready.

Mr. Baumann: We are ready.

The Court: Proceed then.

Mr. Packman: May I before proceeding, your Honor, introduce Mr. Charles H. Houston of the Washington, D. C. Bar?

(Which was done.)

If your Honor please, in view of the importance of this matter, we ask your indulgence to make an opening statement for a few minutes.

Plaintiff's Opening Statement:

I don't think that a more important issue has been presented for the consideration of a court in the State of Missouri since the Dred Scott Case, some ninety years ago, which emanated in this very city. This is not a case involving a jurisdictional fight between unions, as we view it, but one involving a primary issue of economic serfdom for a group of citizens of the United States who happen to be Negroes or colored. It also, of course, involves immediately the rights to a livelihood of the plaintiff and others similarly situated, who are now employed because of the action of this Court in issuance of an injunction against the Frisco Railway, and who had been employed for a number of years by virtue of usage, custom and satisfactory service by that railroad and the Frisco System.

We do not contend Mr. Howard is entitled to retain his job by virtue of any written contract entered into by and on behalf of himself or anyone else. We contend he has a right to retain his job as a property right subject to the right of the Railway to discharge him for cause, but that if third parties for illegal purposes in denial of his constitutional rights and equal protection of the law seek to take away his job opportunity, his accumulated privileges, his personal rights and self-respect, that a court of equity must intervene and will protect those inherent rights of a citizen.

The defendant Brotherhood cannot ignore plaintiff's right as if a stranger, but it has a quasi-legislative function and obligation to him by virtue of a Statute. I am referring to the Railway Labor Act, in which the property constituted collective bargaining agent is considered by the Supreme Court to be in the nature of a quasi-legislative group, having a public trust, a trust which it cannot merely fulfill for the benefit of the members of its own organization, but which it has to fulfill for the benefit of everyone of a particular craft.

We intend to present to your Honor the basic facts showing what work was done by Mr. Howard and others similarly situated that is involved here, and to bring to the forefront of your attention that the thing that makes a craft is not the conviction of a prejudiced group, which bars Negroes from its membership or which has entered into a conspiracy with other white unions which they enforce under the threat of a strike with the railroads that they must not hire Negroes for certain jobs and must deny them opportunities, but the test is, the actual work done, the functions performed, not the man, not the race, not his pay, not the seniority list. A man's craft is not determined by the results of prejudice or chicanery nor his union affiliations or lack of affiliations with any organizations, or the fact that someone perforce of necessity became his spokesman, when he was denied that privilege and the proper representation by the statutory representatives—in this case the Brotherhood of Railroad Trainmen.

It is our contention that the situation, which was culminated in the agreement of March 7, 1946, between the

Frisco Railway and the Brotherhood, is only part of a link of a continuous chain of events, which proves the prejudice and the lack of fidelity to duty of the Brotherhood and that being a statutory agent which breached its duty under the Railway Labor Act, that this court, being the only court to grant relief, to preserve the status quo and to prevent infringement on his constitutional rights, will grant affirmative relief as a court of equity which considers the substance and not the form.

Plaintiff's Case.

Whereupon, the plaintiff, to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Packman: Mr. Howard, will you kindly rise and be sworn?

SIMON L. HOWARD, SR.,

being produced, sworn and examined as a witness in his own behalf, testified as follows:

Direct Examination.

By Mr. Packman:

Q. State your full name. A. Simon L. Howard.

Q. Where do you live?

A. Memphis, Tennessee, 1279 South Lauderdale Street, Memphis, Tennessee.

Q. Will you speak louder so adversary counsel may hear?

A. 1279 South Lauderdale Street, Memphis, Tennessee.

Q. When and where were you born?

A. Columbus, Mississippi.

Q. How many years ago? A. Fifty-four years ago.

Q. Are you married? A. Yes, sir.

Q. Do you have any family? A. Yes, sir.

Q. State who they are.

A. Frank Howard, William Howard—he is dead now.

Q. How old are they? A. Frank is 30; William is 29.

Q. Are any of them going to school?

A. Yes, sir, the baby is going to school.

Q. What school? A. She is going to Clark, Atlanta.

Q. How long have you been employed by the Frisco—St. Louis and San Francisco Railway Company, which through lapse or convenience I may sometime refer to as the Frisco Lines? A. Thirty-two years.

Q. What capacity did you start out in in that railroad as an employee? A. [Frieght] brakeman.

Q. How many years did you hold that job?

A. Four years.

Q. Then what happened?

A. After four years I got injured and I was taken off and put on a passenger train.

Q. Was that in connection with settlement of your claim? A. Yes, sir.

Q. What did you do on a passenger train?

A. Well, the jobs are on a passenger train—relate the whole story?

Q. Yes, relate the story.

A. Open and close switches, pick up and set out cars, watch comparison. That is one of the duties, keep a standard watch and have a comparison every two weeks, and read train orders, watch order board, flag blocks and inspect the train while taking water or coal or in a siding waiting for another train to pass.

Q. If there is no back end brakeman, do you take charge of the flags?

A. Yes, I take care of the head end, do the head end braking.

Q. You do the head end braking?

A. Pick up and set out cars.

Q. Are those the things that a head end brakeman would do if they were a regularly called head end brakeman assigned to that train? A. Yes, sir.

Q. In addition to those things, what else do you do? What is expected of you where there is no chair car porter?

A. Where there is no chair car porter?

Q. Yes.

A. I look after the—keep the coaches clean. I look after the passengers.

Q. How much of your time is devoted to the cleaning part of your duties?

A. Well, the cleaning part of the duties is secondary work. I will say it takes about 95 per cent of my time for braking and the other part, five per cent, for looking after the inside.

Q. Is there anything you have to do on the braking end that is prevented because you have to do any cleaning work on the train as incidental to the other job?

A. Well, we don't let anything come in between us and our job of braking and looking after the safety of the train. If we are cleaning cars and find we are about to pass a station order board, something else, we quit and go out and watch for the board and come back and we have to watch the time.

Q. Are you eligible for promotion? A. No, sir.

Q. Have you ever endeavored to be promoted from head end brakeman or train porter to some other job?

A. No, sir, see, they don't promote us. About all you get, if you are brakeman, why you are just a brakeman. Makes no difference how long you work, you just brake. The company never says anything to you about promotion.

Q. Why?

A. Well, the only reason, I guess, is just because you are colored, I guess.

Q. Are you eligible to apply for a job as a passenger brakeman in so many words, or as a conductor, to be put on the bottom of a seniority list?

A. The way we do that, well, now, when I hired, I made out applications, you see, for a brakeman, made application for a brakeman, which we all do, both white and colored, they make the application for a brakeman and that is what we work on, just our applications.

Q. If a man is hired as a brakeman, is he eligible for promotion as is a white man, according to seniority.

A. Yes, sir.

Q. What is the order of progression?

A. They promote him, in other words, after he brakes for a certain length of time and they needs a conductor, they usually call in the oldest brakeman to take the examination for a conductor.

Q. Then a man who has been a brakeman can, if he has

due time credits and good records, become eligible to become a conductor if he is a white man?

A. Yes, sir, if he is white, they promote him as a conductor.

Q. But the top of the ladder, as far as you are concerned, is this job called a train porter job?

A. Train porter job or a brakeman.

Q. Is that true of other Negroes on the Frisco System?

A. Yes, sir.

Q. It is not a case of your being ineligible for special reasons? A. Yes, that is the case.

Q. What is it?

A. They do not promote a colored man on the railroad.

Q. Do you attend meetings in which the rules are gone over with other trainmen? A. Yes, sir.

Q. Are you required to do so? A. Yes, sir.

Q. Are you given a set of rules in the transportation department which are applicable to all trainmen?

A. Yes, sir.

Q. Do you have to become familiar with all the operating requirements just as anyone called a brakeman or conductor or flagman? A. Yes, sir.

Q. Do you pick up train orders as such? A. Yes, sir.

Q. If something happens to the conductor, what are you supposed to do?

A. Anything happen to the conductor, in other words, if the conductor is busy, we are supposed to watch the train order board and if we catch an order, we are supposed to take this order to the conductor. He goes over it and gives it back to us, let us go over it. The other conductors go get orders, come back, reads orders and comes back and gives it to us for us to read.

Q. Are there short trains in which they just have chair car porter without a head end man?

A. Owing to whether they got chair car porters. We only had two chair car porters on our run during the war.

Q. What were they supposed to do?

A. Their duties were to keep the coaches clean and assist the passengers on and off the train.

Q. That is all they have to do?

A. That is all they have to do.

Q. They have nothing to do with the operating parts of the train? A. No, sir.

Q. Do you have any equipment you are compelled to carry? A. Yes, sir.

Q. What is it?

A. Carry a red flag, torpedoes, fusees, lantern, red light.

Q. Do you have any keys? A. Yes, switch keys.

Q. How about a watch? Is that a standard inspected watch?

A. Standard inspected watch. We have to get watch comparison, as I formerly mentioned, twice a month.

Q. Do you know what equipment a man who is called a brakeman, a white man, is supposed to carry, a head end man? A. Yes, sir.

Q. What does he carry?

A. He carries a red flag, fusees, torpedoes.

Q. Same things you do? A. Yes.

Q. Anything else? A. Not anything else.

Q. Do your draw the same rate of pay as this man who would be called a brakeman? A. No, sir.

Q. How much would you get?

A. Well, before we got this raise, about $169.00.

Q. Do you know what a man who is called a brakeman gets for doing less work?

A. Salary then was around about $207.00.

Q. Is that wage scale fixed under an agreement of some sort for the white man? A. Yes, sir.

Q. Did you ever know of any member of the Brotherhood telling you fellows that you shouldn't do any clean-up work on the cars, that you should confine your activities strictly to braking, that you were entitled to the same rate of pay as a white man?

A. Yes, sir, they told us we ought to be getting the same.

Q. Did they ever go to the front for you to your knowledge? A. No; just a few.

Q. Did you ever try to join the Brotherhood of Railroad Trainmen, one of the defendants in this case?

A. I never have, but I know some of them have sent in applications, found out they was colored and sent the application back.

Q. You are familiar with their rule that they only permit white men to become members? A. Yes, sir.

Q. Were you working for the railroad as a so-called train porter during the first world war? A. Yes, sir.

Q. What happened to your wage standard at that time?

A. Well, in the first world war, I was on a passenger train, and the ruling by McAdoo, he said everybody doing the same class of work received the same class of pay. We got it.

Q. How much was your pay increased to, approximately?

A. At the time, before we went into the—government took the railroad over, we was making about $70.00 a month, and when the government made this ruling, then they paid about $204.00.

Q. Was that the same rate of pay and same wage measure as a white brakeman on the head end of it got?

A. Yes.

Q. How long did that condition last?

A. That lasted until the government turned the railroads back to the private owners.

Q. Do you know what was going on behind the scenes, between the white Brotherhoods and railroads after that?

A. No, sir, I didn't.

Q. Were you familiar that in 1928 four train service organizations, consisting of Brotherhood of Railroad Trainmen, Order of Railroad Conductors, Brotherhood of Locomotive Firemen and Engineers, and another one of the service organizations entered into an agreement with the Frisco that they should not and cannot hire any more negroes for any train service work other than under the label of train porters?

A. No, sir, I didn't know that for some considerable time.

Q. Did any of your friends ever try to get a job on the railroad other than as a train porter or chair car porter?

A. Actually what happened, when they extended the Pensacola Line, the line from Amory to Pensacola, the assistant superintendent told one of the operators that he wanted about eight or ten colored brakemen, so they set out and they sent to Montgomery, Alabama and got one that used to work there sometime ago. By the time he got there, they had got the message they wasn't going to hire any more colored brakeman, so the assistant superintendent had to turn him down.

Q. Did you know just what the reasons were for that at that time? A. No, I didn't know why.

Q. During the first world war when you received the pay

as a passenger brakeman, were you classed as a passenger brakeman? A. Yes, sir.

Q. Did the railroad company after the war get the men signed up in which they had to agree to change their classification and their labor, they called themselves train porters again? A. Yes, sir.

Q. That was the time when they started making less money?

A. Yes, sir. The assistant superintendent come around and told us that if we wanted our jobs, we had to sign for passenger train service only, take this $120.00 a month.

Q. Did you get any notice by the Brotherhood of Railroad Trainmen that they were negotiating with the Frisco Railway to take away the head end brakeman job, that you or others like you were doing on the Frisco Lines?

A. I got a notice about, oh, I guess about the 14th of March, I believe, '46,—referring to that?

Q. No, I am asking prior to March 7, 1946. Did the Brotherhood of Railroad Trainmen or anybody for them tell you what they were planning on doing? A. No, sir.

Q. Did the Frisco Railroad advise some people that you knew that something was afoot to take away your jobs?

A. Well, I understand that Mr. King told some of our boys that the trainmen were going to try to take the jobs.

Q. Did Mr. King ever advise you or anyone else that there were going to be meetings held at Springfield, commencing about March 1, 1946, with the Brotherhood of Railroad Trainmen in which they were going to try to settle a dispute involving your jobs? A. Yes, sir.

Q. When did he tell you that?

A. Well, now, the letter that Mr. King wrote, it was dated January 7, 1946.

Q. That was telling somebody that there was going to be a hearing before an emergency board?

A. Yes, sir, that is right.

Q. You were not a party to that board hearing, were you? A. No, sir.

Q. You didn't have a lawyer there either? A. No, sir.

Q. Were you invited to attend by anyone personally?

A. No, sir.

Q. Do you know whether any representatives of yours were denied a right to be heard at that hearing?

A. Well, we went up there, and they would not let us intervene.

Q. As a party? A. No, sir.

Q. Or put on any evidence?

A. No, they told us we would have to find some grounds to get in on.

Q. Then the next you knew you got a letter about March 14th from the Frisco Railroad, and what did that letter say?

A. The letter said that our jobs would be terminated the first of April.

Q. 1946? A. 1946.

Q. Did they give you any directions as to what you were supposed to do with your equipment? A. Yes, sir.

Q. What did they say?

A. It says, "Turn in your switch keys and lanterns, markers, etc., on April 1st," as quick as you could after April 1st.

Q. Did that notice say that the train was being discontinued or your particular job with the Frisco?

A. Just the job.

Q. Did you notice that there were bids posted for brakeman? A. Yes, sir.

Q. To apply for work? A. Yes, sir.

Q. On various runs? A. Yes, sir.

Q. Did you notice whether there was a bid posted for brakemen to become available to take over your run?

A. Yes, sir.

(Documents handed to the reporter were marked for identification as "Plaintiff's Exhibits 1, 2, 3 and 4, 10/14/46, OP", respectively.)

Q. I show you plaintiff's Exhibit 4 and ask you whether you received a notice similar to that on your division?

A. Yes, sir.

Q. I show you Exhibits 1, 2 and 3 and ask you whether you subsequently saw similar notices to those posted on a bulletin board at your divisional point? A. Yes, sir.

(A document handed to the reporter was marked for identification as "Plaintiff's Exhibit 5, 10/14/46, OP".)

Q. I show you plaintiff's Exhibit 5 and ask whether you received something similar to that in your division at one time or another? A. Yes, sir.

Q. I direct your attention to what appears to be fifty items that the superintendent wanted the train porter to be alert to, and ask you which of those items apply as well to a head end brakeman as they would to you under the title of train porter? A. Let's see, now, the items?

Q. Yes, give the numbers and we won't take the time of the court. He can read it later. Just call off the numbers for the purposes of this record now.

A. See, Item 5 here, says "chair car"——

Q. (Interrupting) Let me read these to you and we will see whether that applies to brakemen or not. I think we can make it clear for the Court. This reads:

"'Mister Train Porter':

Please answer these fifty questions to yourself and help me keep this division free of accidents and personal injuries.

1. "Are you getting your proper rest before you are going out on your run?"

Does that apply as well to a head end brakeman as to you under the heading of a train porter? A. Yes, sir.

Q. No. 2. "Are you comparing time with the conductor to be sure you have the correct time?" A. Yes, sir.

Q. The "yes" means it is the same as the head end brakeman? A. Yes, that is right.

Q. And if you say "no", you mean it applies only to porters, correct? A. Yes, sir.

Q. No. 3. "Are you watching all order boards that govern the movement of your train?" A. Yes, sir.

Q. No. 4. "Are you keeping the coaches clean on your train and bottles picked up so passengers will not stumble over them?" A. That applies only to me.

Q. No. 5. "When you have chair car porters on train, are you depending on him to do all the cleaning or are you assisting him in this work?" A. That applies partly to me.

Q. No. 6. "Are you being courteous to passengers?"

A. That applies to me, yes, sir.

Q. Isn't that expected of a brakeman, too? A. Yes, sir.

Q. No. 7. "Are you picking up all the hat checks?"

A. Yes, sir.

Q. When there is a head end brakeman, is he supposed to do that if there is not porter? A. No, sir.

Q. No. 8. "Are you calling stations properly and distinctly, and awakening passengers at night to get them off at their proper destination?" A. Yes, that applies to them.

Q. No. 9. "At Monett, are you explaining to passengers the proper train for them to take?" You are not on that division, are you? A. No, sir.

Q. No. 10. "Are you carrying the baggage out to vestibules for passengers when they are leaving trains?"

A. That applies to me.

Q. No. 11. "Are you properly identifying trains that you meet?"

A. That applies to all of us. That is the brakeman's; that applies to me.

Q. As well as the brakeman?

A. As well as the brakeman.

Q. No. 12. "At water stops, are you looking your trains over for hot boxes, brake beams down and the like?"

A. Yes, sir.

Q. That applies— A. That applies to brakemen.

Q. "Are you looking at your trains occasionally around curves to see that nothing is dragging?"

A. Yes, sir, that applies to brakemen.

Q. No. 14. "Are you assisting with the head-end work on trains when necessary to expedite the work on your trains?" A. Yes, sir.

Q. No. 15. "When you are handling a facing point switch, are you getting off on the opposite side?"

A. Yes, sir.

Q. No. 16. "When you are in the siding meeting a train, are you staying at the engine until the rear of the opposing train has passed before going to the switch?"

A. Yes, sir, that applies to me.

Q. You say it applies to me?

A. That applies to the brakeman; that is me.

Q. No. 17. "Are you checking passengers boarding your train for their destination to be sure they are boarding the right train?" A. Yes, sir.

Q. That just applies to a man who is not a brakeman?

A. Well, that applies to the brakeman—that applies to the brakeman, too, if he is at a terminal. He only loads the passengers on our division at the terminal.

Q. "Are you giving passengers receipts for money you collect for pillows at time of sale?" A. Yes, sir.

Q. Do you know whether any brakemen, where there is no porter on the train, distribute pillows, front end men, head end men?

A. Well, I never have known. In fact they would on our division—they never call a brakeman for a passenger unless there is a case of emergency. I don't know what he would do then.

Q. No. 19. "Are you endeavoring to board trains when they are moving too fast?" A. No, sir.

Q. Does that advice apply to brakemen as well as you?

A. Yes.

Q. "Before uncoupling passenger cars, are you cutting the curtains?"

A. Yes, sir, that applies to the brakeman. That is a brakeman's duty.

Q. No. 21. "Are you giving clear and distinct signals to enginemen when switching cars?" A. Yes, sir.

Q. No. 22. "Do you know how to give signals properly?"

A. Yes, sir, that applies to brakemen.

Q. No. 23. "Are you being careful in handling of switches?" A. Yes, sir, that applies to brakemen.

Q. No. 24. "Are you sleeping on passenger trains when you are on duty?" A. No, sir.

Q. Is a brakeman supposed to sleep?

A. No, sir, not supposed to sleep.

Q. No. 25. "When you find lost articles on trains, are you turning them in at the proper place?" A. Yes, sir.

Q. Is a brakeman supposed to do that?

A. He doesn't go through and check the train.

Q. If he finds something, is he supposed to turn it in?

A. Yes.

Q. No. 26. "Are you using intoxicating liquors which will numb your brain and make you unsafe to be around a train?" A. No. sir.

Q. That applies to a brakeman as well as to you?

A. Yes, sir.

Q. No. 27. "Are you properly signalling the engineer with communicating signal for flag stops?" A. Yes, sir.

Q. "Do you know if you pull this signal too fast, it is not distinct signal on the engine?" A. Yes, sir.

Q. That applies to the brakeman too?

A. That applies to the brakeman.

Q. No. 28. "Are you going to see to adjust coupling apparatus while cars are coming to a coupling?"

A. Repeat that again.

Q. I can hardly read this. It is a little vague.

A. I tell you what that is: "You go in between the cars".

Q. Something about in between the cars?

A. Go in between the cars, no, sir, we don't go between the cars. It is against the rules.

Q. The rule applies to brakemen?

A. Applies to brakemen.

Q. No. 29. "Are you kicking draw bars with your feet when cars are coming to a coupling?"

A. No, sir, that applies to the brakemen.

Q. None of you are supposed to do it?

A. Not supposed to do it.

Q. No. 30. "Are you mounting pilot steps of a locomotive moving toward you?"

A. No, sir, that applies to brakemen.

Q. You are supposed to be careful, too, in the same manner when you mount a locomotive?

A. Yes, sir, we are not supposed to do that.

Q. No. 31. That applies only to the Springfield Division; I will withdraw that. "32. Are you registering on rest books where you can be located by callers?"

A. Yes, sir, that applies to the brakemen.

Q. All of you? A. Yes, sir.

Q. "Do you understand the APB Block System on the Fort Wood Branch?"

A. They haven't got that on our division. Quite naturally that requires——

Q. (Interrupting) That doesn't apply to your division at all? A. No, sir.

Q. "34. Do you understand how to properly flag a block on single track on the main line?"

A. Yes, sir, that applies to brakemen.

Q. "35. Do you know how to do a proper job of flagging in case you were called on to do so?"

A. Yes, sir, that applies to brakemen.

Q. When you say that applies to brakemen, you mean that applies to you and a brakeman, a man that is called a brakeman? A. Yes, sir.

Q. "36. Are you checking train orders against clearance cards that your train receives and seeing to it that Cards and orders are addressed to your train and you have all the orders that the clearance cards call for?" A. Yes, sir.

Q. "37. Do you always read and understand all the orders that you receive?" A. Yes, sir.

Q. You mean you and the brakeman are supposed to understand and read them? A. Yes, sir.

Q. "38. Do you always watch time in wait orders and see that your train does not pass the waiting point until the time is up?" A. Yes, sir, that applies to brakemen.

Q. Does that apply to a chair car porter or a man supposed to do porter work? A. No, sir.

Q. "39. Do you watch your time card time and see to it that your train does not pass any station ahead of time?" A. Yes, sir, that applies to brakemen.

Q. "40. Do you understand that you must report to the conductor about any passenger that is injured on your train?" A. Yes, sir.

Q. "41. Are you using step boxes where they are needed?" A. Yes, sir.

Q. A brakeman is supposed to use them too?

A. Well, if he loads passengers, he is supposed to.

Q. "42. How is your personal appearance? Do you come out with your shoes shined, clean shirt, cap and uniform neat?" A. Yes, sir.

Q. Does that apply to a brakeman too? A. Yes, sir.

Q. That expectancy? A. Yes, sir.

Q. "43. Do you answer politely when passengers speak to you?" A. Yes, sir.

Q. "44. Are you coming to work with family and financial troubles on your mind that will cause you to make mistakes?" A. You would have to leave them at home.

Q. That advice is given at the rules meeting for all of you? A. Yes, sir, that applies to all of us.

Q. No. 45. "Are you protecting openings on your train at all times?" A. Yes, sir.

Q. That applies—— A. (Interrupting) That applies.

Q. "46. When you have students with you, are you trying to teach them all you can?"

A. Yes, sir, I'm supposed to teach them all I can, and that applies to the brakeman too.

Q. "47. If you don't understand a train order, are you asking someone to explain it to you?" A. Yes, sir.

Q. "48. Are you attending Book of Rules classes when you have a chance?" A. Yes, sir, we have to attend them.

Q. Do you have to pass an examination to become a porter? A. Yes, sir.

Q. Is it the same examination, same type of rules that the brakeman has to pass?

A. The same rule book that they examine the brakemen on, they examine us on.

Q. When you attend these Book of Rules meetings, who else attends them, what other trainmen?

A. Well, the conductors, the engineers, firemen and brakemen.

Q. "49. Do you always carry Special Instructions pamphlet with your time card?" A. Yes, sir.

Q. "Are you reading General Orders before going out on a trip?" A. Yes, sir.

(Documents handed to the reporter were marked for identification as "Plaintiff's Exhibits 6, 7, 8, 9 and 10, 10/14/46, OP", respectively.)

Q. Was there a bulletin put up to the best of your recollection or notice sent to you to sign a receipt for a book of safety rules, the same form of notice that is addressed to both porters and brakemen? A. Yes, sir.

Q. Did you sign such a receipt pursuant to such a request? A. Yes, sir.

Q. I show you Plaintiff's Exhibits 6 and 7, which bear the date of March 25th, one, No. 6, captioned to the attention of train porters and the other one to passenger brakemen. I ask whether you saw slips similar to that in your divisional point? A. Yes, sir.

Q. These were your walking papers? A. Yes, sir.

Q. And also Plaintiff's Exhibit 7 was the paper to the brakemen to take over certain of your equipment, wasn't it, certain of your tasks? A. Yes, sir.

Q. Was there any formal notice to trainmen and yardmen that this United States District Court has issued an injunction and protected and saved your right to continue to work? A. Repeat that again.

Q. Which saved your right to continue to work.

A. Was there any formal notice?

Q. Was there such notice coming from the Frisco posted at the divisional points addressed to trainmen and yardmen in your division? A. I don't recall.

Q. I show you Plaintiff's Exhibit 9 and ask whether anything like that appeared on your bulletin board to the best of your recollection.

A. Oh, yes, sir, yes, sir, I remember this.

Q. You have been working since that time under the protection of the injunction? A. Yes, sir that is right.

Q. Mr. Howard, after the first world war, when there was a reduction in pay by the railroad and your title was changed back to train porter, was there any change in your duties? A. No, sir.

Q. Was there any reduction in your work? A. No, sir.

Q. The work has been the same now as it was back in 1920, 1918? A. Yes, sir.

Q. '17? A. Yes, sir.

Mr. Packman: That is all.

Cross-Examination.

By Mr. Baumann:

Q. Mr. Howard, in 1917, when you were injured, did you make application for transfer from brakeman to that of train porter? A. No, sir.

(A letter handed to the reporter was marked for identification as "Carriers' Exhibit A, 10/14/46, OP".)

Mr. Packman: If your Honor please, I object to questioning in reference to this particular exhibit on the grounds it is irrelevant and immaterial to the issues here. I don't think it is material whether or not he applied for a job as "porting", whatever that means.

Mr. Baumann: I believe we can have the witness explain what he meant by the letter. It is in his original hand writing, I believe, and addressed to his superior officer, and the purpose is to show that he realized he was transferring from braking to a job of portering or train portering.

The Court: Objection overruled. The Court will take it for whatever it is worth.

Q. (By Mr. Baumann) Mr. Howard, I show you a handwritten letter dated December 22, 1917, addressed to P. O. Woods, and I believe bearing your signature. Is that your signature down here? Is that your handwriting?

A. Yes, sir.

Q. Did you write that letter? A. Yes, sir.

Q. Will you examine it and advise the Court whether you wrote that letter? A. Yes, I wrote that letter.

Q. When you made the statement of transferring from braking into a job of portering, as it states here, did you mean you were asking for a transfer from brakeman to that of train porter on the Frisco Railroad?

A. The meaning of that was that I couldn't work regularly on the job of braking on account of my eyes, and I wanted them to give me something lighter to do.

Q. Were you then transferred to the train porters' seniority roster?

A. Train porter? At that time we used the freight brakeman, colored freight brakeman on trains the same as all train porters, and that was the meaning of that. The meaning of that was that I couldn't work on the freight train and make regular time, and I wanted something I could continue to work and make a living out of.

Q. In other words, take the position ordinarily now referred to as train porter and so designated?

A. Well, it was to take me off a freight train and put me on a passenger train where I could work and make a living, that was the meaning of that.

Q. Now, Mr. Howard, are you a member of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated?

Mr. Packman: If your Honor please, I object to that on the ground it is irrelevant what his membership is.

The Court: Objection overruled.

Q. (By Mr. Baumann) Are you a member of that organization? A. Yes, sir.

Q. Is it the organization which handles matters concerning rates of pay and working conditions with officers of the Frisco Railway?

Mr. Packman: Just a minute, I object to that unless he knows.

Mr. Baumann: I am asking him is it. Is it the organization? Is it the organization which handles matters of rates of pay, hours and working conditions with officials of the Frisco Railway Company?

Mr. Packman: I desire to repeat my objection and add to it that it calls for a conclusion of the witness.

The Court: Objection overruled.

A. Yes, sir.

Q. How long has that organization been representing the train porters on the Frisco Lines to your knowledge?

Mr. Packman: I object to it, your Honor, on the grounds it assumes the fact that they are representing the train porters.

The Court: Objection overruled.

A. Well, let's see, now, the beginning of that organization, we had what we considered company organization, and we had certain men that was selected out there to represent us. In fact the organization we was under—let's see, back in 1920, I believe, that we had an organization that Sandy Eslinger—in other words, it was a lot of porters went around and tried to coax a lot of us to sign up to work for $120.00 a month; and we were told if we didn't sign up to work for $120.00 we wouldn't have any job, and, of course, quite naturally we just figured a piece of loaf was better than no loaf at all and we had to take that.

Q. (By Mr. Baumann) Was there an organization as an organization representing the train porters on the Frisco Lines that was a predecessor to the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated? Was there another organization? A. Yes, sir.

Q. What was the name of that organization?

A. Well, just to be frank with you, we didn't have any—we didn't have any name. It was just a group of us together and one would represent the whole entire group.

Q. Did you as train porters have a general chairman who handled grievances with the management?

A. Yes, sir.

Q. Was he selected by the train porters?

A. Well, the first one we got was Sandy Eslinger. He was appointed. He wasn't selected.

Q. Did he represent you for a number of years? I mean did he represent the train porters for a number of years in handling grievances with the management? A. Yes, sir.

Q. For about how many years did Eslinger represent the train porters?

A. Well, now, let's see, I will say from about '21 up until, I guess, about 1930, I guess. I can't recall just how long.

Q. Did you have another general chairman who represented the train porters on the Frisco properties after that time?

A. Well, we fooled around and we managed to get into A. F. [and] L.

Q. Under what organization?

A. This organization you just mentioned, and we had a charter with the A. F. [and] L. and something come up about the head end of these trains and we went to the front to try to protect our interest and the A. F. [and] L. wrote our representative and told us that they issued us a charter, the best of my remembrance, to help organize labor and—to help organize labor, make better jobs for the men and not to make worse jobs. That is the meaning of it. And I think our answer was then that we wasn't trying to tear down organized labor; we was just trying to save our side of it. In other words, the contention of the Brotherhood was to kick us out in the cold, and we was trying to hold our jobs.

Q. By the "A. F. of L." you mean the American Federation of Labor?

A. Yes, sir, so my understanding they revoked our charter. They revoked our charter. That left us out in the cold.

Q. Did you at one time have an organization or belong to an organization known as the Protective Order of Railway Trainmen in America? A. No.

Q. You were not a member of that organization?
A. No, sir, I don't know anything about that.

Mr. Baumann: That is all.

By Mr. Judge:

Q. Mr. Howard, you are familiar with seniority rosters, are you? A. Yes, sir.

Q. Does your name appear on any seniority roster of the railroad as a train porter? A. Yes, sir.

(A Seniority Roster handed to the reporter was marked for identification as "Brotherhood's Exhibit 1, 10/14/46, OP".)

Q. Mr. Howard, I show you what purports to be a seniority roster of the Birmingham and Tupelo Sub Divisions and refer you to Page 3, "Seniority Roster—Train Porters", and ask you if you see your name thereon?

A. Yes, sir, the second one here.

Q. Now, Mr. Howard, just above that seniority roster of train porters, on the same page, I ask you if you see the seniority roster of passenger brakemen? A. Yes, sir.

Q. Does your name appear on that roster?

A. No, sir. Now, this seniority roster here, I didn't make the seniority roster. There wasn't a thing in the world I could do. This seniority roster, I didn't make this seniority roster and there wasn't a thing in the world I could do for it to get my name off of it and make me a brakeman, and I just had to either let it stay there or quit work.

Q. Mr. Howard, are you familiar with the contract which the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, has with the railroad?

Mr. Packman: If your Honor please, I object to that on the ground it is irrelevant to the issues in this case. The cause of action is not based upon any alleged contract. He claims his right of relief by virtue of being a citizen and having a job, as a valid property right.

The Court: Objection overruled.

A. Relate that again.

Q. (By Mr. Judge) You know there is such a contract between your organization and the railroad, do you not, Mr. Howard? A. Yes, sir.

Q. Have you ever seen that contract? A. Yes, sir.

Q. I am going to read to you Rule 19 of Article 5 in this contract: "Separate seniority rosters of train porters and chair car porters, showing the names and date of seniority will be posted for inspection of employes interested. Seniority rosters will be revised and posted in January and July of each year and shall be open for correction for a period of thirty (30) days from date of posting, on presentation of proof of error. Seniority dates not protested within thirty (30) days following date of posting first seniority roster issued, shall be considered permanently established. Copy of seniority rosters will be furnished employes' representative."

Now, have you ever made any protest as to the manner in which the seniority rosters have been made up?

Mr. Packman: If your Honor please, I believe that a fair reading of that means that in reference to that particular roster, if he is improperly placed on that roster, he should complain as to his priorities. It has nothing to do with whether he has a complaint about not being placed on another type of seniority roster.

The Court: I don't see what difference it makes. Objection overruled. It will be received subject to the objection.

A. No, sir, the seniority roster, as I aforesaid, din't a thing in the world I could do. If I had made any protest, it wouldn't have amounted to anything.

Q. (By Mr. Judge) You never made any protest, though? A. No, sir, I didn't make any protest.

Q. Now, Mr. Howard, when the job as train porter becomes open on any run, what is the manner in which that position is filled? A. Train porter?

Q. Yes. A. It is filled from the train porters' roster.

Q. The seniority roster here? A. Yes, sir.

Q. The men oldest in seniority have first chance at that run, is that correct? A. That is right.

Q. Could anyone other than a man on this train porter seniority roster claim a job as train porter?

A. Repeat that again.

Q. Could any man who is not on the seniority list as a train porter claim a job as train porter?

A. No, sir, the company won't let him have it. In fact, he wouldn't take it as a train porter. You couldn't get a brakeman—they couldn't get him to take it, because he wouldn't do the work that we are doing.

Q. How about a chair car porter; could he take a job as a train porter?

A. Well, they did give them the job of train porter.

Q. There is a separate seniority list for chair car porters, is there not? A. Yes, sir.

Q. Separate from your train porter seniority list?

A. Yes.

Q. Now, the train porters' jobs were filled only from the train porter seniority roster, is that not correct?

A. Aus Gaddy, Harry Swan, Rogers Montgomery, James Howard, and Henry Brown, Ozie Conway, Major Hope, all those, required to have the Book of Rules examination just the same as the brakemen, been using them on troop trains as brakemen, been using them on troop trains as brakemen and continued using them up until April 1st. I made several trips on it myself. Now, when I come down to the train portering, they have run me down to Birmingham on my regular run, on passenger run and doubled me out on the troop train. Wasn't a thing on there to do but brake; no portering on there to do. So in my way of thinking, this seniority roster that they got here was something to dodge the issue to keep from paying us a standard rate of pay of calling us a brakeman.

Q. You have not been receiving the same pay that a brakeman receives? A. That is the only thing that I see.

Q. Have you ever made claims for the same pay?

A. Oh, we made that when they first cut our pay. We just saw that we just was look like losing breath and, of course, we just had to crush.

Q. Mr. Howard, in your division down there, are there any colored men who are called brakemen? A. Yes, sir.

Q. Let me have that back again, please.

Q. The seniority roster?

A. Yes, sir. Now, let's see. This James Howard, Conway, Major Hope, they are cut off the board now on account of—in other words, they were hired and put out there to protect these troop movements, used them as brakemen, still they call them chair car porters; so it just looks like to me it was something the porter was using——

Q. (Interrupting) There are colored men on the brakemen's seniority roster, are there not? A. Yes, sir.

Q. But you are not on the brakemen's seniority roster?

A. After the government turned the roads back to the owners——

Q. (Interrupting) Back in 1920?

A. Back in 1920, that put the pressure on us, and, of course, we had—we was caught in passenger service. We had to stay there or quit.

Q. Do you know whether the colored men on the brakemen seniority roster draw the same pay as white brakemen? A. Yes, sir.

Q. They do?

A. Yes, sir. They draw the same pay. Now, they draw the same pay but they don't have a thing in the world to do with the organization. They don't belong to the organization and all they get is the pay and take what is left. In other words, if a job is put up for bulletin, I will say this: The brakeman doesn't have anything to do, the colored brakeman doesn't have anything to do with the making of a contract, voting for any raise or working conditions or whatever. He just takes what the white brakeman provides for him. That is all he gets.

Q. He gets the same as the white brakeman, does he not?

A. He gets the same.

Mr. Packman: You are referring to freight brakemen?

Mr. Judge: I am referring to colored people carried on the brakemen's seniority roster.

Mr. Packman: I think it would clarify for the Court, they are only freight brakemen in that category.

Mr. Judge: Well you may ask him that, Mr. Packman. Mr. Howard, are you an officer of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated? A. No, sir.

Q. Have you ever been an officer?
A. Yes, I have been an officer.
Q. You have been an officer of that organization?
A. I was local chairman.
Q. You were local chairman? A. Yes, sir.

Mr. Judge: That is all I have.

(Copy of Western Union Night Letter handed to the reporter was marked for identification as "Plaintiff's Exhibit 11, 10/14/46, OP".)

The Court: We will take a few minutes recess.

Whereupon, a short recess was taken, pursuant to which the following proceedings were had:

The Court: All right, gentlemen.

SIMON L. HOWARD, SR.
resumed the stand and testified further as follows:

Redirect Examination.

By Mr. Packman:

Q. Mr. Howard, are the Negro brakemen in passenger service ever called brakemen or are they called train porters? A. They are called train porters.
Q. Now, are there any brakemen in the freight service who chance to be Negroes? A. Yes, sir.
Q. Do you remember when they were hired?
A. Well, now, let's see, Abe Smith was hired about October 13th, I believe, 1913.
Q. Are there any men who are called freight brakemen who were hired since 1928? A. No, sir.
Q. How many men were there in the freight brakemen service who were Negroes prior to 1928?
A. On our division down there, between Memphis and Birmingham, I will say around 25 or 30.
Q. How did that compare to the number of white men at that time?
A. Well, that compares, I will say, practically 50-50 proposition.
Q. Now, since 1928, what has happened to the class

known as Negro freight brakemen? How many are there compared to white men? A. Got about seven, I believe.

Q. How many white men are there?

A. Oh; I just couldn't tell you. I guess around a hundred some odd.

Q. Is this freight brakemen service entirely on the outside? A. Yes, sir.

Q. Was that fit work for you to do, this outside braking, in view of your injury? A. No, sir.

Q. Back in 1917? A. No, sir.

Q. And that is why you asked for this inside work on the front end? A. Yes, sir.

Q. Could Negroes get representation from the Brotherhood of Railroad Trainmen? A. No, sir.

Q. Who were in the passenger service? A. No, sir.

Q. As brakemen? A. No, sir.

Q. Did you join in a wire on March 19, 1946, with Mr. Tillman, Mr. Otho McKinney, that was addressed to Mr. A. F. Whitney, President of the Brotherhood of Railroad Trainmen, at Cleveland, and Mr. C. O. Carnahan, General Chairman of the Brotherhood of Railroad Trainmen, at Springfield? A. Yes, sir.

Q. And another man? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 11 and ask if that is a copy of a wire that you caused to be addressed to those gentlemen whose names appear there in the caption?

A. Yes, sir, that is.

Q. Were you permitted to join the Brotherhood of Railroad Trainmen? A. No, sir.

Q. Did this indicate that they would be glad to take up your grievance? A. No, sir.

Q. Did you have any choice in the matter when a Negro was appointed to take up the grievances for the train porters? Was there any white man appointed by the Brotherhood who was willing to take up your grievances with the railroad? A. No, sir.

Q. Did any white man connected with the Brotherhood ever say to you fellows that they would go to bat for you and get you the same pay as the white men who were members of this organization? A. No, sir.

Q. Did they ever go to bat for you and say they were going to get you more pay because you are doing more work than expected of a white brakeman? A. No, sir.

Q. Do you know of any runs on your division where there are white head end brakemen who take over, doing the very same work that a Negro porter does on that section of the division on the same train?

A. On one and two out of here, down in Texas some place where they got—

Q. (Interrupting) Tell what happens.

A. Well, a white brakeman goes down, I believe, about Springfield and Monett.

Q. On the head end?

A. On the head end, then the porter gets on and takes it from there to the destination, some place down there.

Q. Coming back, what happens?

A. When he comes back?

Q. The man called the porter.

A. The man called the porter comes back to Monett or Springfield and then the white brakeman takes it from there and comes on into St. Louis.

Q. There is no train porter doing the head end work?

A. No.

Q. When the white man is off the train, the colored man does the same work? A. Yes.

Q. Plus a little more? A. Yes, sir, a whole lot more.

Q. Do you know of any instances where they couldn't get a train porter where they put on a white man to do the head end work? A. Yes, sir.

Q. For how many years prior to the time you were assigned as a train porter was it that train porters were doing the same kind of work to the best of your knowledge and understanding? A. Repeat that, please.

Q. How many years prior to 1917 when you were put on train porter work for the Frisco was it that train porters were doing the same kind of work on the head end of Frisco trains?

A. Well, just as far back as I can remember so-called train porters have been doing that work.

Q. During the first world war, were you on a different seniority roster for your head end work? A. No, sir.

Mr. Packman: That is all, Mr. Howard.

(Witness excused.)

Mr. Packman: May we consider the exhibits which have been referred to by the witness as offered in evidence?

The Court: Very well, received in evidence without objection. I believe there were no objections.

Mr. Judge: No objection.

(Said Plaintiff's Exhibits 1 to 11, inclusive, so offered in evidence, having been previously marked for identification, are in words and figures as follows:)

Plaintiff's Exhibit 1.

"Amory, March 28, 1946

Supplement No. 1—

OD Notices Nos. 63-64-65-69-70-71-72-

Post—Central Station—Yale—Amory—Carbon Hill—Dora—East Thomas—Terminal Station—Magnolia—

Brakeman positions covered by the above numbered bulletins on Trains 107 and 108, 207 and 208, 223 and 224, will be paid 51¢ per day differential for handling mail, baggage and express between stations or lock boxes and train.

T. J. CONNELL,
E. A. OSBORNE,
Asst. Supts.

cc JAM TJC EAO
JDS HNB NCC"

Plaintiff's Exhibit 2.

"Office of Asst. Superintendent

Amory, March 28, 1946

Supplement No. 1—

OD Notices Nos. 63-64-65-69-70-71-72

Post—Central Station—Yale—Amory—Carbon Hill—Dora—East Thomas—Terminal Station—Magnolia—

Brakemen positions covered by the above numbered bulletins on Trains 107 and 108, 207 and 208, 223 and 224, will

be paid 51¢ per day differential for handling mail, baggage and express between stations or lock boxes and train.

T. J. CONNELL,
E. A. OSBORNE,
Asst. Supts.

cc JAM TJC EAO
JDS HNB NCC"

Plaintiff's Exhibit 3.

Office of Asst Superintendent

Amory, March 25, 1946

CD Notice No. 6—

Brakemen—Birmingham Sub—

Post—Amory—Carbon Hill—Dora—East Thomas—Terminal Station—

Will accept bids until 4:00 PM March 30th for two additional brakemen in regular passenger pool trains 105-106-107-108 between Memphis and Birmingham. To be assigned to these jobs applicants must have regular passenger uniforms. These positions to be effective April 1st and successful bidders will be placed on runs as soon thereafter as practicable. Mail bids to Trainmaster, Amory.

E. A. OSBORNE,
Asst. Supt.

cc JAM TJC EAO
JDS HNB
Callers, Yale
Thos Yd"

Plaintiff's Exhibit 4.

"Springfield, March 19, 1946

837-

Train Porters:

C. Massingale
Fred Wallace
U. V. Weathers
Hurley Bibbs
J. V. Bagley
Jesse Coleman
J. G. Troutt
J. J. Burton
Nelson Burton
R. E. Tindall
Luke Stover
L. H. Lewis
T. Ruffin
Lee Stover
C. W. Shipps
L. Barnes
E. Marshall
Wm. Owen
Samuel L. Phillips
Andrew L. Thomas
Johnnie Needham

Effective April 1, 1946, position of train porter discontinued on trains 11 and 12, 3 and 4, 5 and 6, 7 and 8, 9 and 10.

Turn in to Assistant Superintendent on April 1, or as soon thereafter as possible, your switch key and coach key.

L. B. CLARY.

cc/ Messrs.

R. O. Davis
J. L. Mumma
H. H. DeBerry
H. M. Cloud
N. T. Overby
E. H. Russell
W. W. Little
J. W. Constant
A. Lamb
L. A. Taylor"

Plaintiff's Exhibit 5:

"Springfield, Mo., May 4, 1943

'Mister Train Porter'

Please answer these fifty questions to yourself and help me keep this division free of accidents and personal injuries.

1. Are you getting your proper rest before you are going out on your run?

2. Are you comparing time with the conductor to be sure You have the correct time?

3. Are you watching all order boards that govern the movement of your train?

4. Are you keeping the coaches clean on your train and bottles picked up, so passengers will not stumble over them?

5. When you have chair car porters on train, are you depending on him to do all the cleaning or are you assisting him in this work?

6. Are you being courteous to passengers?

7. Are you picking up all the hat checks?

8. Are you calling stations properly and distinctly, and awakening passengers at night to get them off at their proper destination?

9. At Monett, are you explaining to passengers the proper train for them to take?

10. Are you carrying the baggage out to vestibules for passengers when they are leaving trains?

11. Are you properly identifying trains that you meet?

12. At water stops, are you looking your trains over for hot boxes, brake beams down and the like?

13. Are you looking at your trains occasionally around curves to see that nothing is dragging?

14. Are you assisting with the head-end work on trains when necessary to expedite the work on your train.

15. When you are handling a facing point switch, are you getting off on the opposite side?

16. When you are in the siding meeting a train, are you staying at the engine until the rear of the opposing train has passed before going to the switch?

17. Are you checking passengers boarding your train for *for* their destination to be sure they are boarding the right train?

18. Are you giving passengers receipts for money you collect for pillows at time of sale?

19. Are you endeavoring to board trains when they are moving too fast?

20. Before uncoupling passenger cars, are you cutting the curtains?

21. Are you giving clear and distinct signals to enginemen when switching cars?

22. Do you know how to give signals properly; if not, you should ask some older porter or an officer to show you.

23. Are you being careful in handling of switches; if you handle them wrong, you may cause a derailment.

24. Are you sleeping on passenger trains when you are on duty?

25. When you find lost articles on trains, are you turning them in at the proper place?

26. Are you using intoxicating liquors which will numb your brain and make you unsafe to be around a train?

27. Are you properly signalling the engineer with communicating signal for flag stops? Do you know if you pull this signal too fast, it is not distinct signal on the engine?

28. Are you going between cars to adjust coupling apparatus while cars are coming to a coupling?

29. Are you kicking draw bars with your feet when cars are coming to a coupling?

30. Are you mounting pilot steps of a locomotive moving toward you; if so, sooner or later you will fall and the results will be serious.

31. Do you understand when you arrive at Newburg with special trains that you are to take the engine to roundhouse and when starting at Newburg on special trains it is your duty to go to roundhouse and get engine if necessary?

32. Are you registering on rest books where you can be located by callers?

33. Do you understand the APB Block System on the Fort Wood Branch?

34. Do you understand how to properly flag a block on single track on the main line?

35. Do you know how to do a proper job of flagging in case you were called on to do so?

36. Are you checking train orders against clearance cards that your train receives and seeing to it that Cards and orders are addressed to your train and you have all the orders that the clearance cards call for?

37. Do you always read and understand all the orders that you receive?

38. Do you always watch time in wait orders and see that your train does not pass the waiting point until the time is up?

39. Do you watch your time card time and see to it that your train does not pass any station ahead of time?

40. Do you understand that you must report to the conductor about any passenger that is injured on your train?

41. Are you using step boxes where they are needed?

42. How is your personal appearance? Do you come out with your shoes shined, clean shirt, cap and uniform neat?

43. Do you answer politely when passengers speak to you?

44. Are you coming to work with family and financial troubles on your mind that will cause you to make mistakes?

45. Are you protecting openings on your train at all times?

46. When you have students with you, are you trying to teach them all you can—remember someone had to teach you.

47. If you don't understand a train order, are you asking someone to explain it to you?

48. Are you attending Book of Rules classes when you have a chance?

49. Do you always carry Special Instructions pamphlet with your time card and are you reading General Orders before going out on a trip?

50. Are you subscribing ten per cent of your salary through the payroll deduction plan for the purchase of War Bonds to help win this war?

(Signed) G. H. JURY,
Superintendent."

Plaintiff's Exhibit 6.

"Chaffee, Mo Mar 25th 1946

Train Porters:

Wm. Spencer
R. H. Crittenden
O Williams
Joe Stark 808 Joe Starks 04928
H Simms
G Pickens
A Ruffin
F Bolden

Effective April 1st 1946, position of train porter discontinued on trains 808-807-805 and 806- The porters working out St. Louis Mar 31st will work back into St. Louis

April 1st None will work out St. Louis on April 1st 1946. The two Porters working back into St. Louis April 1st their jobs will be discontinued on arrival St. Louis that date.

All Porters will turn over their equipment to flagman on train on the last trip into St. Louis, except switch key other passenger equipment keys book rules and personal transportation turn this over to Mr. R O Davis at Gratiot.

G H JURY.

Cy-Mr R O Davis-Gratiot

When the above equipment turned over to you send to me Chaffee"

Plaintiff's Exhibit 7.

"Chaffee, Mo Mar 25th 1946

Psgr-Bkmen

Johnson
Smith
West
Shuford Robert H. Crittenden 10413
Oaks
French
JGYoung

Train Porters have been instructed to turn over to you on their last trips into St. Louis Mar 31st and April 1st and also Mar 30th all their equipment which is used on Psgr Train—Such as marker equipment all flagging equipment window Lifts and supplies they have on hand St. Louis.

After March 31st 1946 you will be required to take care of your flagging equipment Markers ETC at St. Louis and Memphis—will be necessary for you to put them away at each point and get them on your outbound trip—

If you are not now familiar with places where markers are stored at each end of the road and how they are

handled suggest you go with porter on his last trip into Memphis and St. Louis and learn their locations.

JACHRONISTER."

Plaintiff's Exhibit 8.

"Thayer—March 30, 1946.

Wentworth Starks,
Train Porter,
Springfield, Mo.

This will cancel my letter March 25th, in connection with train porter's board at Springfield being discontinued.

The board will be maintained as heretofore until further advised.

A. M. MALGREN.
Wentworth Starks
Extra train porter
18936."

Plaintiff's Exhibit 9.

"Springfield, Mo., March 30, 1946.

Notice to All Trainmen and Yardmen:

Case No. 3, complaint of Brotherhood of Railroad Trainmen, against Train Porters being used to perform the duties of brakemen on passenger trains, carried on the December 21, 1945 strike ballot, was settled by agreement between the company and the Brotherhood of Railroad Trainmen March 7, 1946, reading: 'Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued.'

The company had made all preparations to carry out this settlement, but it is necessary to cancel these arrangements because of a temporary restraining order issued in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri in suit by a train porter on behalf of himself and others against the Trustee, St. Louis-San Francisco Rail-

way Company, to the St. Louis San Francisco and Texas Railway Company, to the Brotherhood of Railroad Trainmen and to C. O. Carnahan, General Chairman Brotherhood of Railroad Trainmen, and serving upon the Railway March 29, 1946, which temporary restraining order provides:

'It appearing to the court from the verified petition that the plaintiff and others similarly situated for whom the action was brought should have the benefit of a temporary restraining order against the above named defendents in order to safeguard their rights and prevent irreparable loss and damage to them and acts prejudicial to the public interest based on alleged violations of the Railway Labor Act (after giving said defendents who had due notice of this hearing an opportunity to be heard) does herewith order that a Temporary Restraining Order be issued directed against the Defendents Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis, San Francisco and Texas Railway Company, a corporation, enjoining and *restraining said defendants from putting into operation the agreement entered into on the 7th day of March 1946*, with the Brotherhood of Railroad Trainmen requiring the discontinuance of Train Porter positions effective April 1, 1946, and enjoining and restraining said defendents from replacing Plaintiff and other negro trainmen known as train porters with white brakemen as planned and agreed with the Brotherhood of Railroad Trainmen, and the aforesaid defendents are ordered to withdraw the notice issued to Plaintiff and other negro trainmen to the effect that their services as train porters were being terminated effective April 1, 1946 *from train porters their presently assigned tasks* pursuant to the said agreement made on the 7th day of March, 1946, until further order of this court.' (Italics supplied.)

'This Federal Court Order leaves us no choice but to [withold] compliance with the agreement of March 7, 1946 between the Railway and the Brotherhood of Railroad Trainmen.

F. H. SHAFFER."

Plaintiff's Exhibit 10.

"Amory—April 11, 1946.

Porters Calhoun Edwards, H. P. Brown, Walter Eatman.

Brakemen Chas. Ward (c), C. P. Riddle, C. R. Pennington, E. A. Miller, A. S. Kennedy, J. W. Garling, Lee R. Guthrie, J. E. Wolfe, W. G. Edwards, J. H. Majors, Troy Dyson.

Attached receipt for Book of Safety Rules which you will please sign and return to me. Presume you have received book of safety rules but receipt has been misplaced. Please return first mail.

T. J. CONNELL,
E. A. OSBORNE."

Plaintiff's Exhibit 11.

"Western Union Night Letter.

Mr. A. F. Whitney, President,
Brotherhood of Railroad Trainmen,
Standard Building,
Cleveland, Ohio.

Mr. G. W. Alderson, Secretary-Treasurer,
Brotherhood of Railroad Trainmen,
Standard Building,
Cleveland, Ohio.

Mr. C. O. Carahan, General Chairman-Trainmen,
Brotherhood of Railroad Trainmen,
528 Woodruff Building,
Springfield, Missouri.

Your organization the Brotherhood of Railroad Trainmen the Statutory representative of craft and class of trainmen on St. Louis-San Francisco Railway Company and the St. Louis-San Francisco and Texas Railway Company and Mr. C. O. Carahan, General Chairman-Trainmen, B. of R. T. (Frisco Lines), 528 Woodruff Build., Spring-

field, Mo., have made an agreement with the officers of the (Frisco Lines) which will become effective April 1st, 1946 which will cause me to [loose] my job as trainman for the (Frisco Lines) on account of being a member of the Negro race. Myself and other Negro trainmen in same category desire to join your brotherhood the Brotherhood of Railroad Trainmen and we want your organization and representatives to represent us under contracts your organization have in effect between your organization and the Management of the St. Louis-San Francisco Railroad Company and St. Louis-San Francisco and Texas Railway Company. Will you permit us to join your organization? If so we beg your favor to give us notice. We also beg your favor to have agreement between your organization and the Management of the (Frisco Lines) to become effective April 1, 1946 set aside that myself and other Negro trainmen will not [loose] our jobs. Wire us collect your answer.

Signed:—

JAMES M. TILLMAN,
SIMON L. HOWARD,
OTHO McKINNEY,
and other involved.

Senders Address:

2103a Market Street,
St. Louis, Missouri,
March 19, 1946."

Mr. Packman (Addressing Clerk): Do you have as part of the files of the Court a deposition taken at Springfield, Missouri, on October 10, 1946, of Mr. Morey? If your Honor please, adversary counsel are willing to let us use the copy in lieu of the original which is not at hand.

(Copy of deposition of Mr. Frank W. Morey, handed to the reporter was marked for identification as "Plaintiff's Exhibit 12, 10/14/46-op".)

Mr. Packman: If your Honor please, I am going to read the deposition of Mr. Frank W. Morey, which was taken

at Springfield, Missouri, pursuant to notice to take depositions on October 10, 1946. (Reading)

(Plaintiff's Exhibit 12.)

"Mr. Frank W. Morey, of lawful age, being produced, sworn and examined, deposeth and saith:

"Direct Examination by Mr. Packman:

"Q. State your full name? A. Frank W. Morey.

"Q. Where do you live?

"A. Well, I live here in Springfield part of the time and part of the time in Branson.

"Q. I understand that at one time you were General Chairman of the Brotherhood of Railroad Trainmen?

"A. That is right.

"Q. Give us the time intervals there? A. Sir?

"Q. Give us the time intervals there? Give us the time periods?

"A. By golly, I have forgotten the year I resigned, it was on July 4th two or three years ago, I was with them about twenty-five years.

"Q. So you were General Chairman in the State of Missouri for the Brotherhood on the Frisco Lines in the year 1928? A. Yes, sir.

"Q. And prior to that you were General Chairman for a number of years, right? A. That is correct.

"Q. What are the duties of the General Chairman of the Brotherhood?

"A. Well, sir, they are pretty complicated. Of course, the duties are, if we have complaints or grievances which have been handled locally and the failure to adjust with local officers, those cases that are deemed necessary by such Locals are sent to the General Chairman for the proper handling with the proper officers.

"Q. Does the General Chairman get appointed for a particular railroad line, so that the Brotherhood of Railway Trainmen has a General Chairman for the Frisco Lines, and Chairman for the Katy, etc.?

"A. He is elected for a particular line.

"Q. And when I identified you before as General Chairman I meant to imply, and I want you to affirm it if it

is correct, that you were the General Chairman of the Brotherhood of Railroad Trainmen for the St. Louis San Francisco Railway Company? A. Yes, sir.

"By Mr. Baumann: And the Frisco System Lines.

"By Mr. Packman: Q. Was that confined to the state of Missouri? A. Nine states.

"Q. Wherever the Frisco operated? A. Yes, sir.

"Q. Did you, as General Chairman, receive advice and directions from the National Office at Cleveland on questions of general policy?

"A. Yes and no, you do if it were on some particular general interest or if it were asked. In other words, if I deemed it necessary to inquire of some particular advice it is always available.

"Q. Were you subject to orders as distinguished from unbridled discretion?

"A. You will have to qualify that, that covers a pretty broad scope.

"Q. Did the Brotherhood of Railroad Trainmen admit negroes as members? A. No, sir.

"Q. Has that been a constant policy of the organization, to your knowledge, from its inception?

"A. I belonged to the organization for about forty years and we have never taken negro members.

"Q. That is provided, that restriction is covered by its constitution? A. I think so.

"Q. In 1928, Mr. Morey, you may recall there was an agreement entered into, signed by the Brotherhood of Railroad Trainmen, through you, and by other railway organizations, through their own employees, and the St. Louis-San Francisco Railway Company, with reference to the future employment of negroes in train, engine and yard service?

"By Mr. Judge: I want to object to that on the ground it is immaterial to the issues involved in the case.

"By Mr. Baumann: I think I will join in that objection.

"A. Now, in answer to that I will have to answer in accordance with the records because I have been out of the service and taking it pretty easy and I am going to keep

on doing that for quite a little while and I will have to answer that by the records.

"Mr. Packman: I will show you a copy of what purports to be a Memorandum of Understanding of Responsibility for and Duties Under an Agreement made between the Four Train Service Organizations and the St. Louis San Francisco Railway Company, which purports to have been signed on March 14, 1928, and was witnessed by Edwin P. Morrow, Member Board of Mediation, I show you that to facilitate the questioning and to refresh your memory.

"By Mr. Judge: May it be understood that the objection will go to the entire series of questions relating to this?

"By Mr. Packman: You are speaking of irrelevancy and you don't want to repeat the objection to each separate question?

"By Mr. Judge: Yes, sir.

"By Mr. Baumann: Same here.

"By Mr. Packman: It may be so understood. We will assume for the purposes of this deposition that it is a true copy, subject to further corroboration by adversary counsel, who do not have other independent means of verification at this time.

"Q. Mr. Morey, I observe this memorandum, which purports to have been signed by the four train service organizations collaborating and signing the same agreement with the St. Louis San Francisco Railway Company, do you remember the situation which created the collaboration between the four train service organizations?

"A. Well, as previously stated that was a contention that might have been momentarily growing larger in the particular territory where those negroes were hired, and the failure to reach a correction locally, it was forwarded in due form to me and presumably so with the other organizations for handling.

"Q. You say it was forwarded to you from where?

"A. From the respective territory, we call it the "Deep South."

"Q. Part of the nine states where you had some fra-

ternal, or shall we say, 'Union Interest,' had forwarded to your office here at Springfield the Complaints, is that it?

"A. Yes, sir.

"Q. And tell me though how come that the four train service organizations collaborated in what was finally accomplished, how did you work out your arrangements for the collaboration?

"A. That is, as I recall, and that is again from memory, we were handling other matters in conjunction with this, in other words, as I recall, quite a docket of cases among which this was enumerated, therefore, the entire docket was cleared. Therefore, the signatures attached would be, I think the grand finale of all the subject matter.

"Q. Do you know whether any Stipulation was entered into disposing of any other matters which were contraversial with the St. Louis San Francisco Railway Company? A. That would have to be of record.

"Q. What sort of records were kept by you at that time?

"A. Minutes of meetings we were conducting.

"Q. And where were those minutes written physically?

"A. They were written physically in all the offices of the organizations, at least, I know they were in mine.

"Q. Did you mail copies of them to the National Office so they would know what was going on?

"A. I don't recall whether we did or not.

"Q. Did you have any routine in that connection?

"A. We have some elacticity, we are not bound to jump to the Grand Officer every time a thing is or isn't accomplished.

"Q. When you have executed a document through you as General Chairman, do you send a copy of that document to the National Office?

"A. I think you will find in this the Chief Executive Officer of the Transportation Organizations was there, let me see that a minute.

"Q. Mr. S. R. Harvey, whose title is Vice-President of the B. of R. T., and he is one of the top executives of the B. of R. T.? A. Yes, sir.

"Q. Do you remember his physical presence at the time this instrument was signed, or was it submitted to each of you for signature when you might have been separated in your respective offices?

"A. Do I understand the question to be, how were the signatures affixed?

"Q. That is right, do you recall the details?

"A. After the conclusion of the docket, we all signed the document.

"By Mr. Packman: For the purpose of this record we will refer to this document as Plaintiff's Exhibit 'Morey A' ".

And that document I am presenting to you at this time. That is a copy of the original which we have a stipulation among counsel is available and the verity of the copy will not be challenged.

Morey Exhibit A.

Memorandum of Understanding of Responsibility for and Duties Under an Agreement Made Between the Four Train Service Organizations and the St. Louis-San Francisco Railway Company.

The four train service organizations have insisted and demanded for several years that St. Louis-San Francisco Railway Company have an understanding with them that in the future the Company would not employ any more Negroes in train, engine and yard service, but not including train porters. This demand and request upon the part of the organizations has been based upon the allegation that colored firemen under arrangements prevent and make almost impossible opportunity for the training of white firemen to become engineers and limit their opportunities so to do; that colored employes cannot render the intelligent service necessary to safe operation in train, engine and yard service; that constant friction and irritation arises out of the whole situation and various other reasons.

The Railway Company has made known to the Organizations their very real apprehension and fears that in the event such an agreement was made the negroes in train, engine and yard service now in the employ of the Company, would be either intimidated, threatened or coerced into

abandoning their positions or through indirect methods of false charges, repeated complaints, alleged infractions of rules, etc., would be driven from the service of the Company.

The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations. The four train service organizations acknowledge and fully recognize the right of negroes now in the employ of the Company to the positions to which they are entitled under schedule rules and their right to fill these positions under fair and honest conditions without unfair action of any character being taken by the members of those organizations directly or indirectly for the purpose of compelling the abandoning of these positions or their elimination from employment. The four train service organizations undertake that they can and will see to it that neither by nor through their membership is any advantage taken of this agreement in order to compel the abandonment of the positions now held by negro employes; that on the contrary, realizing the position of the management and their own assumption of responsibility, they will put forth every effort to see that conditions feared by the management shall not occur. It is the good faith of all parties that the present negro employes shall have fair and equal rights to remain in their positions, subject, of course, to the same measures of discipline and entitled to same impartiality of dealing.

Both parties shall co-operate together and use their best endeavors to carry this agreement into effect. In event that a situation shall arise which demonstrates lack of safety for colored employes or of unfair dealings with them this matter shall promptly be taken up with the train service organizations for the purpose of prompt and efficient prevention and correction. If it can be fairly shown thereafter that such conditions continue to exist then the Management reserves the right to hold itself released from the understanding entered into.

In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employes in train,

engine and yard service but not including train porters, only white men shall be employed.

(Sgd) J. W. BOWLER
General Chairman, B. of L. E.

(Sgd) E. H. KRUSE
Ass't Grand Chief Engineer, B. L. E.

(Sgd) OTIS EMBRY
General Chairman, B. of L. F. & E.

(Sgd) FRED W. LEWIS
Vice President, B. of L. F. & E.

(Sgd) L. S. THOMPSON
General Chairman, O. R. C.

(Sgd) J. A. GANNON
Vice President, O. R. C.

(Sgd) F. W. MOREY
General Chairman B. of R. T.

(Sgd) S. R. HARVEY
Vice President, B. of R. T.

(Sgd) J. E. HUTCHISON
Vice President—St. Louis & San Francisco Ry.

Witness—March 14, 1928.
EDWIN P. MORROW
Member Board of Mediation

Might I rest a moment while you are reading that? I will get a little water.

May we proceed, your Honor?

The Court: Yes, go ahead.

Mr. Packman: (Reading) "Q. Who prepared this document, to your knowledge?

"A. Well, we all had something to do with that.

"Q. Did you have a Draft which you all got together on and changed a word here and there, or did you dictate it all together at one session?

"A. We had prepared our points and submitted our points.

"Q. And do you remember how long that this negotiation lasted leading up to the final signing of this instrument?

"A. No, I don't, that would be a matter that could be proven by records.

"Q. And how far back did you retain records while you were General Chairman?

"A. I expect from the time I went into office.

"Q. You say minutes were kept, what particular form of record did you keep your minutes in, was it a bound book or loose leaf?

"A. No, we keep records, you know, pertaining to each particular case, and at the conclusion of those cases the minutes that I have referred to would be the minutes that were sent to the respective organizations, as you might say, to enlighten them on the results of the conference held.

"Q. While you were General Chairman of your own organization who would you send your minutes to?

"A. I would send them to all the local organizations.

"Q. You would then keep a copy of what you had forwarded for your own office purposes here in Springfield?

"A. That is right.

"Q. And how were those filed or indexed?

"A. They would be minutes of the particular meeting, designating that particular meeting.

"Q. By date? A. Yes, by date.

"Q. Do you know Mr. Edwin P. Morrow, Member of the Board of Mediation? A. Yes, sir.

"Q. Was he here in Springfield or where was this conference held? A. St. Louis.

"Q. Is it your recollection this Morey Exhibit 'A' was physically executed by you in St. Louis? A. Yes, sir.

"Q. Was that in the Office of the St. Louis San Francisco Railway Company? A. Yes, sir.

"Q. At that time were the other General Chairmen and the Executive Officers, whose [signature] purport to be on here, present? A. Yes, sir.

"Q. Do you know whether any attorney for the B. of R. T. had prepared a Draft of this particular Exhibit before it was signed by you? A. No, I think not.

"Q. Did you contact the home office, that is the one in Cleveland, the National Office before this instrument was signed or executed?

"A. No, the Vice-President from the National Office was there.

"Q. So his presence made it unnecessary for you to contact anyone in Cleveland?

"A. Should it have been necessary I would have.

"Q. Should it have been necessary that would have obviated? A. Yes, sir.

"Q. Do you know whether S. R. Harvey is alive?

"A. No, I don't, to the best of my knowledge Sam is alive.

"Q. Do you know where he maintains headquarters?

"A. Cleveland.

"Q. Is he still, to the best of your knowledge, Vice-President of the B. of R. T.? A. Yes, sir."

May I skip parts that I think will be irrelevant, Mr. Judge?

Mr. Judge: Yes.

Mr. Packman: Reading Question 8 on Page 11 and skipping what precedes on that page.

"Q. I am going to read you parts of this exhibit for the purpose of formulating questions, starting out as follows: 'The four train service organizations have insisted and demanded for several years that St. Louis San Francisco Railway Company have an understanding with them that in the future the company would not employ any more negroes in train, engine and yard service, but not including train porters.' Is that statement correct, Mr. Morey, which was recited here, that the four train service organizations, which included the Brotherhood of Railroad Trainmen, for years prior to 1928 had insisted and demanded that the St. Louis San Francisco Railway Company agree that the company would not employ any more negroes in the train, engine and yard service?

"A. That is more or less correct.

"Q. What was the basis of that objection on the part of the Railroad Brotherhood?

"A. Well, they have several objections, to begin with the service in the south is pretty badly hampered when you try to mix these two races together on an equal footing, and there is just a natural antagonism apparently that has never been overcome, that is one reason. Another reason, experience had indicated that it was very unpopular and impractical from the viewpoint of a Southerner to place in authority the lives of the travelling public in the hands of the negroes. Therefore, they could not be promoted

anyhow, and not being promoted brought about a condition that placed the negro on certain positions that could not revert to anyone else uhtil their removal from that job from some other source.

"Q. Was that failure to promote the negro due to the objection on the part of your organization, in part?

"A. Yes, I would say that it was.

"Q. You specify that a condition arose in the south, was it intended to limit this agreement to merely the South, whatever you imply by that?

"A. They were not being employed in any other territory.

"Q. Would you consider St. Louis to be in the South?

"A. No, sir.

"Q. What do you mean by 'the South'?

"A. We mean by 'the South' the other side of the river, as we call it, the Mississippi.

"Q. Well, the Mississippi River runs north and south generally, do you mean the west side?

"A. We take for example, on the Memphis side.

"Q. That is the east side? A. Yes, sir.

"Q. Does that mean then that the problem that you were encountering did not prevail on the west side or north of Memphis?

"A. That problem that we were encountering did not exist in any other territory except in the south where negroes had been employed for many years.

"Q. Weren't there any negroes employed to the north or west of the Memphis region by the St. Louis San Francisco Railway Company? A. Not in the train and yard service.

"Q. And were there men who were called train porters who did train service work?

"A. Well, the train porters employed as to whether they did train work or not I couldn't say as to that.

"Q. Were there negro brakemen to the north and west of the Memphis area? A. No, sir.

"Q. Did you make any effort in preparing this agreement to delimit the scope to apply only to negroes, negro employees, to the south and east of the Memphis territory?

"A. Well, we would have objected just as strenuously one place as another.

"Q. So although the chief complaint arose on the other

side of the river, as you phrase it, it was the policy of your organization to prevent negroes from blocking jobs, or job opportunities for members of your Brotherhood irrespective of where located, isn't that true? A. Yes, sir.

"Q. And wasn't that also the policy of other train service organizations?

"A. You will have to let them speak for themselves.

"Q. To your knowledge did the Brotherhood enforce such agreement as this on other railroads and other territories which did not involve the deep South?

"A. As to that I could not say.

"Q. Do you know why a class called 'train porters' were excepted although they were under the general heading of train, engine and yard service?

"A. They didn't do it, at least, not supposed to do any work pertaining to the train, engine and yard service.

"Q. Were you aware of what they had actually been doing under that caption or job classification of 'train porters'?

"A. Well, I would have no way of definitely knowing what each porter would do, there are too many porters on this railroad.

"Q. If you had knowledge they were doing brakemen's work at the time would you have made it a point that was going to be forbidden?

"A. Yes, I would have objected to it.

"Q. So it was intended by this agreement to confine the negro to labor work as distinguished from anything involving discretion?

"A. It was intended just as the instrument reads.

"Q. I am talking about the state of mind as to what you thought you were accomplishing for your organization?

"A. We had in mind the special territory in which negroes were hired for the particular employment that we objected to.

"Q. I know but you said it wouldn't have made any difference, that you wanted the scope of it to include all territories and to restrict negroes everywhere, isn't that true?

"A. If they had hired negro switchmen in Springfield this article would have gone forward as a reason for that objection.

"Q. In the first paragraph there is this further state-

ment: This demand and request upon the part of the organizations has been based upon the allegation that colored firemen under arrangements prevent and make almost impossible opportunity for the training of white firemen to become engineers and limit their opportunities so to do; that colored employees cannot render the intelligent service necessary to safe operation in train, engine and yard services; that constant friction and irritation arises out of the whole situation and various other 'reasons.' Mr. Morey, you subscribed to this instrument where it was stated that colored employees cannot render the intelligent services necessary to safe operation in train, engine and yard services, did you mean that literally, that without exception that is true?

"A. Well, that is problematical, that is something I couldn't tell you, maybe we have a miracle man somewhere that could.

"Q. Was it your thought and belief no exception should be made, irrespective of individual merit of the employee, if he was what you call 'colored' or a negro?

"A. I think that question is covered in my first statement.

"Q. Now, you subscribed to this instrument which also sets out, 'and various other reasons' that is rather vague and we would like for you to expound on that sentence, were there reasons or policies on the part of your organization to exclude from economic benefits, negroes who were not due paying members, or not members of your organization?

"A. It wasn't a question of whether they paid dues or not, they just were not eligible for membership, the dues did not enter into this.

"Q. But since they weren't members your organization thought that they shouldn't have the benefits or advantages of those who were members of your organization?

"A. The white employees who weren't members of the organization will receive just as many benefits as the fellow who did.

"Q. But those are somewhat in the minority, those white employees who do not belong to your organization, correct?

"A. Yes, in that respect the negro receives practically

the same benefits, he gets the same rate of pay and same working conditions.

"Q. That is the negro who had his job established prior to 1928? A. That is right.

"Q. However, no new negro could obtain such a job opportunity afterwards? A. That is right.

"Q. And that was the intention of this agreement, to restrict them in job opportunities, is that right?

"A. Correct.

"Q. Do you know whether the Brotherhood has ever changed its attitude in that respect?

"A. I couldn't answer that.

"Q. You, as a member of the Brotherhood, have you ever heard of any change of policy? A. No, sir.

"Q. Now, in the third paragraph there is this statement: The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations.' Do you know why that was put in there, had the railroad been kind of nervous about signing this agreement unless you assumed responsibility?

"A. I don't know, you will have to ask them about that.

"Q. You were a signer of it and you helped phrase the language did you not?

"A. I don't recall what the birth of that was, again, I say that I am speaking only from memory, a lot of water has been over the dam since then.

"Q. From the same river?

"A. Yes, sir, so they may have been and may not have been reluctant, I couldn't say as to that.

"Q. The next sentence reads: 'The four train service organizations acknowledge and fully recognize the right of negroes now in the employ of the company to the positions to which they are entitled under schedule rules and their right to fill these positions under fair and honest conditions without unfair action of any character being taken by the members of these organizations directly or indirectly for the purpose of compelling the abandoning of these positions or their elimination from employment. The four train service organizations undertake that they can and will see to it that neither by nor through their membership is any advantage taken of this agreement in order to compel the abandonment of the positions now held

by negro employees.' That was to further clarify that in the future though your membership would not refrain to compel the abandonment of future positions by negroes in the train, engine and yard service?

"By Mr. Judge: I object to the question, the agreement speaks for itself.

"By Mr. Packman: "Q. Was that what you intended to do?

"A. No, the meaning of that, as I recall it, there was quite a feeling upon the part, I might say, the company taken, that there was a vague possibility of someone trying to bring about an action setting aside some jobs that were then held by negroes and that was never the intention, and it wasn't the intention to change anything that the negro has had; the organizations were attempting to do everything they could to allay any such ill feeling or uncertainty on the part of the company in that respect.

"Q. Was it intended that a negro was entitled to retain certain jobs and duties without"—substituting the word "complaint" for "transfer"—"complaint by any one of these four organizations?

"A. That is right, or anybody else.

"Q. So, if he was called a train porter and he did a brakeman's work, that same kind of work he did before, that same work was supposed to be protected?

"A. We were not dealing with the train porters because if he followed the train porters work he was not involved.

"Q. Now, in the last paragraph, it was all summarized, I take it: 'In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employees in train, engine and yard service, but not including train porters, only white men shall be employed.' Was there a definite desire on the part of your Brotherhood to make the train services in the future white operated with the exception of the train porters?

"A. I think my original statement answers that question.

"Q. Do you know if subsequent to 1928, while you were still General Chairman, whether the Brotherhood endeavored to delimit the duties which were undertaken by train porters who chanced to be negroes?

"A. Again, I will have to speak from memory, I do

recall vaguely that I may have objected, and I think possibly I may have, to some train porters performing work that should have been allocated to train brakemen. Now, that is just speaking from long distant viewpoint, because I haven't any records here but seems to me I recall something of that character.

"Q. Do you know of any white men who were train [proters] working for the railroads?

"A. No, there may have been instances where a train porter could not have been secured and they may have used a white fellow to fill the crew, I don't say that couldn't have been possible.

"Q. You didn't have an agreement that for certain work only negroes should be employed, did you, you weren't restricting the opportunity of the white man even to be a train porter were you by this instrument?

"A. Well, we had no contract for train porters so we were not negotiating or legislating either way.

"Q. Was your organization the exclusive bargaining agent for men who performed brakemen's tasks?

"A. Yes, sir.

"Q. And that was for men who happened to be white or black, you were the exclusive bargaining agent?

"A. We were the exclusive bargaining agent for men who were white because we had no membership for blacks.

"Q. As a statutory bargaining agent under the Railway Labor Act, did your organization feel obligated to represent the negro brakemen?

"A. Well, the negro brakeman, we never had any objection to his gleaning all the advantages they could gain that from agreement that we might make.

"Q. If the men you called 'porters' were in addition being brakemen, did you ever as part of your collective bargaining suggest they were not only entitled to brakemen's pay and, in addition, extra pay for the luggage carrying? A. I never.

"Q. Did your organization in the twenty or more years in which you were General Chairman ever contend that brakemen who performed porter work be confined to brakemen's work and brakemen's pay? A. Yes, sir.

"Q. When was that? A. Several instances.

"Q. If you wanted the porters to abandon that part of their work, which was strictly confined——

"A. Exactly the opposite, we wanted the brakemen not to do Porter work and be confined only to the brakeman's work.

"Q. And you wanted only the white men to be brakemen? A. That is right.

"Q. But if it chanced to be a negro brakeman doing a brakeman's job and a porter's job, your organization never took the view he should abandon the porter work as being unfair to the other brakemen?

"A. We had no negro brakemen doing porter work.

"Q. It is our view in this lawsuit, Mr. Morey, that these men who are called train porters, are combination men, who are brakemen plus porters, and despite the fact that they are doing more work than the brakemen, they are, none the less, brakemen, and that your organization was aware of that throughout the years. We are trying to find our how fair you were to these men, whether your organization was trying to get for these men who chanced to be negroes the same pay as white brakemen who chanced to be members of your organization?

"By Mr. Judge: We object to that question for the reason it is immaterial to the issues of the case.

"By Mr. Baumann: I think that you are trying to find out whether Mr. Morey, as General Chairman, in behalf of the Brotherhood, endeavored to obtain more pay for the negroes who were called 'train porters' than they were receiving.

"By the Witness: No, sir.

"By Mr. Packman: Q. How many distinctive classes and crafts were included in the membership roster of the Brotherhood of Railroad Trainmen?

"By Mr. Baumann: May I suggest you limit your question to the Frisco System?

"By Mr. Packman: I didn't know there was any difference.

"By Mr. Baumann: And ask what classes or crafts they were bargaining for.

"Q. How many crafts or classes on the Frisco System did the Brotherhood of Railroad Trainmen represent as a collective bargaining agent?

"By Mr. Packman: I adopt that as my question.

"A. We were the collective bargaining agent for brakemen and yard men. Such as herders, pilots, back-up men, switch tenders, etc.

"Q. And some of these men whom your organization represented, did they have divers jobs sometimes the same month for the railroads? A. They could have.

"Q. Did some of them, such as the yard foreman, sometimes do work which was that of a switchman or herder?

"A. Well, he may have in rare instances, I can't much imagine a foreman bothering with that, it would be in cooperation if he did, you know railroad men have got to work together if they get the job done, you know.

"Q. Can you detail to me the duties of a head-end brakeman? And, if you miss a few it would be all right.

"A. I am sure to miss a few, if I were to start telling you all the things that a head-end brakeman should do, from now until Gabriel blows his horn I still wouldn't be able to enumerate all of them.

"Q. However, there are some very obvious duties of the head—duties of the head-end men, and give us the outstanding ones.

"A. At places where there is no other arrangements made he brings the engine from the roundhouse to the train, he rides, as a rule, the head-end known as the engine, and, of course, he observes all block signals in conjunction with the engineer and fireman, and heads trains in to the siding, if necessary assists in backing up and sending out, assists in packing hot boxes and cooling same, and as stated before many, many other things.

"Q. That doesn't mean that each brakeman does all the things that he is supposed to do, that is, on one day he may do one thing and another day another, is that right?

"A. Yes, because railroads are just like sailors, jobs, no two days are cut on the same pattern. I don't know in my years of experience have I ever made the same trip identical, I may do this today and tomorrow and not do it exactly the same, we are not machines, that is where the intelligence and all comes in of these men in the train and yard service, they have got to have initiative and intelligence that makes for snap judgment.

"Q. Do the brakemen have to pass an examination

before they are qualified for their position or before they are assigned as brakemen? A. Yes, sir.

"Q. And they have to answer certain questions and know the rules or the trainmen's schedule, what do you call that? A. Book of rules.

"Q. And if a man isn't competent will that examination tend to disclose that fact? A. That is a managerial question.

"Q. And if a man can pass that examination that tends to indicate he knows what duties are to be performed?

"A. Again I say to you, we get them after that is passed upon by the management.

"Q. And if the train porters have passed that examination apparently the management is satisfied with them, would they still be as new men not available for a job called a brakeman under the terms of this agreement your organization entered into with the St. Louis-San Francisco Railway Company in 1928?

"A. Personally, it isn't my opinion that the Porter receives the same examination the brakeman receives.

"Q. You don't know?

"A. I know that I never heard of them making student trips as brakemen. That is what they are required to do as brakemen.

"Q. People making trips, wouldn't it be just as effective whether they are called tourists or whether they are called sailors?

"A. Well, that is rather a far-fetched comparison as to porters and brakemen.

"Q. Do you know anything that the head-end brakeman does that a train porter isn't asked to do on occasions?

"A. Well, that is a question I couldn't answer, because as I told you before, I never tried to follow the movements made by any of the porters.

"Q. Did you, when General Chairman, correspond with the home office with reference to the problems prevailing with the St. Louis-San Francisco Railway Company to desist from hiring negroes for trainmen's jobs?

"A. I think I have answered that question.

"Q. I am asking about correspondence.

"A. I rather imagine there might have been, the records would disclose that.

"Q. You mean the records in the local office here?

"A. The records leading up to the instrument in question.

"Q. So this wasn't a spontaneous thing which occurred at the moment in St. Louis but there was some parleying and correspondence back and forth?

"A. Yes, sir, I don't say as to whether there were any letters involved or not, as to that I don't remember.

"Q. Do you remember talking about this to any official of the St. Louis-San Francisco Railway Company prior to the signing of this instrument, called Morey's Exhibit 'A'?

"A. No, I don't definitely recall, I may have, I wouldn't state as to that definitely.

"Q. Prior to the signing of this instrument, Morey's Exhibit 'A', has it been the practice of the St. Louis-San Francisco Railway Company to hire men irrespective of their color for these particular services of which the restrictions later were signed?

"A. Will you make that a little more clear?

"Q. Prior to March, 1928, had it been the practice of the St. Louis-San Francisco Railway Company when employing men for train, engine and yard service, not to discriminate on account of their color or membership in any particular organization?

"A. Prior to that time had hired and were hiring negroes in yard service, now the other fellow can speak for the train service.

"Q. I get your point, your organization was essentially concerned about the yard service?

"A. That is right, in other words, I give the other fellow the same right to testify for himself that I expect.

"Q. Did your organization have figures available showing how many negroes had been employed by the St. Louis-San Francisco Railway Company from the end of the first World War until 1928?

"A. If they did, I don't recall it, of course, it would be easily accumulated anyway.

"Q. It wasn't a question then of how many negroes were being hired by the St. Louis San-Francisco Railway Company but a question of no negro should be employed in the future, was that it? A. That is right.

"Q. It wasn't a question of how intelligent were the negroes but they were negroes, and those were the standards that you set?

"A. No, I wouldn't say that, in that regard, I think that question is answered in my previous statement if you will read it.

"By Mr. Packman: I want to ask Mr. Judge if he will make inquiry of the local office right now and see if he can get a copy of the Minutes in reference to the March 14th agreement, and everything that transpired the few weeks beforehand."

Do you have that report, Mr. Judge? At this juncture may I ask if you have the document referred to in this question?

Mr. Judge: That is not ours. That is a borrowed copy from another organization.

Mr. Packman: Might I have it identified for the purposes of this record? I won't offer it formally in evidence, but may read parts of it into the record.

(The document referred to, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 13, 10/14/46, OP".)

Mr. Packman: I show your Honor Plaintiff's Exhibit 13, which is a "Joint Report of General Committees of O. R. C., B. of R. T., B. of L. E., B. of L. F. E.," which initials are an abridgment of the long names of the Brotherhoods, of the dates of February 29 to May 15, inclusive, 1928. Later on, I will direct your Honor to the precise page where Case No. 5 was a subject matter of discussion which led up to the signing of this Morey agreement, and I call to your attention a significant omission from this report—

The Court: (Interrupting) Have you offered this in evidence?

Mr. Packman: I intend to offer it in evidence. I call to your attention at this time that the Morey agreement which was executed March 14, 1928, between those dates, which purport to be completely reported in that printed report is missing and no reference is made as to why it was not printed. Other testimony will clear that up. (Continuing Reading.)

"Cross-Examination: By Mr. Baumann: Attorney for Defendant, Frank A. Thompson, Trustee"—

Might I proceed to read that or do you want to read it?

Mr. Baumann: You go ahead.

Mr. Packman: (Continuing Reading.)

"Q. Mr. Morey, when you were General Chairman of the Brotherhood of Railroad Trainmen did you ever undertake to represent train porters as a group? A. No, sir.

"Q. Now, why was that?

"A. Well, the reason for it was, to begin with, it would be unfair to attempt to represent a fellow that you couldn't give membership to.

"Q. Did you consider train porters a separate group of employees in your mind? A. Oh, yes, definitely.

"Q. Now, did you have any so-called head-end brakemen in the passenger service of the Frisco System?

"A. Yes, sir.

"Q. When you had head-end brakemen in the passenger service was there also generally a train porter on that train?

"A. Well, there may have been and may not have been.

"Q. What did you understand ordinarily to be the make-up of employees on an ordinary passenger train on the Frisco system?

"A. The ordinary make-up on a passenger train on the Frisco System is carried out in an article commonly known as the Trainmen's Contract, which provides the crew of a passenger train shall consist of, not less than a conductor and brakeman, so we would understand that a crew would consist of not less than a conductor and brakeman.

"Q. Now, these train porters, did you consider them as trainmen like a conductor or brakeman? A. Definitely not.

"Q. Did you consider them as a sort of an assistant to the conductor on a passenger train?

"A. Not as an assistant to the conductor because we have what is known as an assistant conductor who assisted the conductor in handling transportation, but that again is a thing which the conductor has to testify to.

"Q. Now then, a train, ordinary passenger train, having a conductor, a brakeman, and a train porter, assuming it was necessary for that train to head in to a siding, who threw the switch at the head end in that case, if you know?

"A. That has been handled in a good many different ways, sometimes by virtue of being helpful and to expedite the movement, a fireman might throw the switch, in other instances the conductor might throw it, then again, the brakeman on that train would go forward and throw it,

in most instances you would find that the brakeman would be the one that is authorized to throw the switch.

"Q. Who protects the rear end of the train when the brakemen threw the switch?

"A. It would depend on the circumstances where they wanted to head in, might be in some cases where the head end was protected by operating rules.

"Q. Do you know whether or not the so-called train porters were required under company rules to pass a physical examination, rules of examination, and to carry a standard watch?

"A. No, I don't recall, I don't know the qualifications that the company exacted from the porters.

"Q. In your position as General Chairman you considered them separate and apart as a group of employees?

"A. Yes, sir.

"Q. Did you at the time you left the service as General Chairman consider them separate and apart as a group of employees?" Maybe she repeated.

"Q. Did you at the time you left the service as General Chairman do you know if the Brotherhood of Railroad Trainmen had represented certain colored brakemen in the south as a collective bargaining agent?

"A. I think I answered that by saying that negroes received the same benefits that white men received.

"Q. If a colored man was a brakeman on the company road as a collective bargaining agent you represented his interests the same as you did the white brakeman?

"A. Yes, in other words, if we negotiated a wage move, he enjoyed whatever increase was secured the same as the white men.

"Q. Now, when you negotiated matters concerning working conditions, is the same answer true?

"A. The same answer is true.

"By Mr. Packman: What is the meaning of the phrase 'working conditions'?

"By Mr. Baumann: I might have Mr. Morey put that down, his thoughts.

"Q. What would be your general understanding about working conditions as distinguished from wages?

"A. I think you could secure that better by getting an

exhibit, which would be known as the schedule, that is an instrument agreed to by the company and the organization. That would answer your question.

"Q. To put it briefly, would it be interpretation of your so-called Trainmen's Schedule? A. Yes, that is right.

"Q. That is what you generally consider as working conditions? A. Yes, sir.

"Q. Would that term also include a change in the wording or text of that Trainmen's Schedule?

"A. You mean as to the application?

"Q. Yes.

"A. Yes, any change in the working conditions would apply.

"Q. Perhaps you might explain further, are the wages contained in the so-called trainmen's schedule, this contract, are they a part of the contract or not? A. They are.

"Q. And everything else in the contract except the part about wages, you consider working conditions, is that right? A. Yes, I imagine you could technically.

"Q. To make it a little more explanatory when you negotiate concerning wages, or wage matters, that is generally separated from negotiations under working conditions?

"A. Well, I understand that has generally been true but I understand that in the last conference held that there were some rules involved, of course, I wasn't there, and I was out of it but know they had some.

"Q. But when you arrive at an understanding concerning those, they are generally separate aren't they?

"A. Yes, sir.

"Q. They are wage adjustments and the other is an adjustment as to working conditions? A. Yes, sir.

"By Mr. Packman: Is that defined, Duties and Responsibilities?

"A. I think if you bear with me and get a schedule to use as an exhibit it will clarify all that to you.

"Q. But the word 'Working Conditions' all is contained or set forth in the Trainmen's Schedule?

"A. That is right.

"By Mr. Baumann: That is all.

"Cross Examination: By Mr. Judge: Attorney for Defendant, B. of R. T. and Defendant, C. O. Carnahan."

Mr. Judge, do you want to read it?

Mr. Judge: You are doing beautifully. I will if you don't want to. (Reading)

"Q. Mr. Morey, railroad employees in general are carried on seniority lists, are they not? A. That is right.

"Q. And how are those seniority lists broken down, I mean by classes or crafts? A. Yes, sir.

"Q. Within a division of the road usually?

"A. Yes, I can best illustrate that in this way, we only have seniority at a given place, take for example Springfield men on the seniority roster in Springfield as brakemen would not be on the seniority roster of brakemen in [Forth] Worth.

"Q. Now, how are the yard men's seniority lists prepared, that is, is there one for all yard men, or are they broken down by subclassification?

"A. No, I tried to explain that to you previously but I guess it got by.

"Q. I understand the classification of employees but I wondered if you had seniority lists for each classification?

"A. No, the seniority list for yard men, in other words, we have one seniority roster for yard men.

"Q. Regardless of what he actually does?

"A. Yes, if you will recall I testified before that a man may be a foreman today and elect to become a helper tomorrow, subsequent thereto, a switch tender, but at the same time he would revert back to his original status as a foreman should he elect to do so without any impairment of seniority on any of the jobs so held due to the fact that there is but one seniority roster, is that clear?

"Q. Yes, that is what I understand; now, a man's right to a particular job that is open would depend on his place on the seniority roster, is that right?

"A. Yes, and his discretion.

"Q. As to whether he wanted it or not?

"A. That is right.

"Q. And if it were a yard job and he were top man on the Yardmen's Roster he would be the man with the first right to the job?

"A. Yes, that may sound to someone that isn't a railroad man rather ambiguous but here is the reason for that. Railroad men never stop work, night or day railroads run, sleet or snow they run. Now, the common herd just doesn't understand why we are so zealous guarding seniority. A man may work from four o'clock until midnight, eight hours, then he may work from midnight until morning, as a foreman, but in due course of time he may find that it is more desirable to work from eight o'clock to four P. M. as a helper. Now, in his electing to do that we hold hard and fast to this single roster that he might be able to do that and still not have lost anything.

"By Mr. Packman: Is that the yard service Roster?

"A. Yes, sir.

"Q. Would a brakeman be on the yard service roster. too? A. No, that is a separate roster.

"By Mr. Baumann: Q. Isn't it possible that yard service men be on the road brakemen's roster as well as the yard roster?

"A. No, our seniority lists are separate and distinct.

"By Mr. Judge: Q. There is a brakemen's seniority roster also? A. Yes, sir.

"Q. Now, are there any train porters on the brakemen's seniority roster? A. No, sir.

"Q. Do you know if there is a separate seniority roster for train porters?

"A. That would be an assumption, I rather assume there [there] is.

"Q. And if there were a vacancy, a job vacant for a brakeman, the man with the first right to that job, I take it, would be the top man on the brakemen's seniority list or roster? A. Yes, making application for it.

"Q. No train porter would have the right to apply for that Brakeman's job?

"A. No, he has no seniority as a brakeman.

"Q. Mr. Morey, while you were General Chairman, did the train porters, or any individual train porter, ever make any claim that they belonged to the class or craft of brakemen?

"By Mr. Packman: You mean make claim to him?

"By Mr. Judge: Yes.

"A. Not to my knowledge.

"Q. Not to your knowledge? A. No, sir.

"Q. The Brotherhood of Railroad Trainmen operates as a fraternal organization does it not? A. Yes, sir.

"Q. And how is membership in the individual lodge determined, where a man is making application for membership, who passes on that? A. The membership.

"Q. The membership itself?

"A. We vote on the regular ballot, secret ballot, the white balls elect and black balls reject.

"Q. You, as General Chairman, could not admit a man or reject a man yourself? A. Definitely not.

"By Mr. Baumann: Q. Is that a local law whereby the employees are admitted to membership?

"A. Yes, sir, in other words, every Local as a rule is granted a Charter and number and name and, of course, certain members belong to certain Locals by virtue of the jurisdiction assigned to that Local.

"By Mr. Packman: Q. Who makes up the Seniority Roster? A. The company.

"Q. And who segregates the respective rosters into the brakemen's roster as distinguished by the yard service roster? A. The company.

"Q. Were any porters promotable to brakemen under the contract or the agreement of March 28th or was that forbidden?

"A. Well, a porter wouldn't be in line for promotion, we just don't have brakemen promoted from porters.

"Q. Could any negro brakeman be promoted to any higher job? A. No, sir."

There is a question missing there. I believe you asked the question, "Why is that?" Is that your recollection?

Mr. Packman: I will adopt that as the question.

Mr. Judge: (Reading)

"A. You will have to ask the company about that.

"Q. Isn't there some restriction in this agreement

which would prevent the company from promoting a negro? A. Not that I know of.

"Q. Would white brakemen be eligible for promotion according to the seniority list or roster? A. Yes, sir.

"Q. What type of job are they eligible?

"A. A freight brakeman is promoted to freight conductor.

"Q. And from there on they can go to what?

"A. Passenger conductor.

"Q. Do you have a different collective bargaining agent for the group known as freight conductors in the Brotherhood of Railroad trainmen."

That should be "than the Brotherhood of Railroad Trainmen," isn't that correct, Mr. Packman?

Mr. Packman: Yes, I think the word should be "than."

Mr. Judge: (Continuing reading)

"A. Different one represents freight conductors and [passengers] conductors.

"Q. Are you aware of the restrictions in the O. R. C. or Order of Railway Conductors, whether they permit negroes to become members of their organization?

"A. I am not conversant with their laws.

"By Mr. Baumann: Q. Mr. Morey, you said that the company made up the seniority roster, aren't those rosters approved by a representative of the Unions?

"A. Yes, they have a right to within a given time, if there is no objection after they are compiled they will stand as approved; now, the reason for that is, I might take an example, a fellow that was away on tuberculosis leave and he was left off the roster and call the attention of the supervising force, so and so's name is off the roster, purely an error, and he was returned to it. Each fellow watches his own standing on the seniority roster and, of course, he wouldn't relish being left off of it.

"Q. You are still on the seniority roster?

"A. I am on there as a freight conductor, passenger conductor and brakeman.

"By Mr. Packman: Q. Is that three respective rosters?

"A. Two.

"Q. Two, the conductors' roster and the brakemen's roster? A. Yes, sir.

"Q. So a man can be on more than one roster, is that right? A. He can on train service.

"Q. Not in the yard service?

"A. No, I tell you how, I don't know what the setup is, I refer to the Yardmasters the Yardmasters have a separate roster, then he, too, could be on two separate rosters.

"By Mr. Baumann:

"Q. Your yardmasters are selected by the company in the final analysis? A. Yes, that is right.

"Q. Your yard foremen are they selected by the company?

"A. No, sir, the freight brakeman, he comes down by virtue of his years of seniority for promotion.

"Q. Do you have a separate roster for yardmen and you have a separate roster for road brakemen do you not?

"A. Yes, sir.

"Q. Do you consider the two separate crafts and classes? A. Yes, sir.

"Q. And is it possible for a yard man to transfer to the brakemen's roster? A. Yes, sir.

"Q. Under what circumstances?

"A. He could transfer from which one to the other did you say?

"Q. From yard service to road service?

"A. He could transfer from yard service to road service but in so doing he would come on to the road roster as the youngest man on that roster, likewise, in so doing he would forfeit his seniority in the yard service.

"Q. He would then become purly a road man?

"A. That is right and vice versa, unless they have changed it now.

"Q. Now going from a road brakeman to the conductors ranks, how is that accomplished?

"A. That is accomplished by retaining his brakeman's seniority and accruing in addition conductors seniority; there is a purpose for that because in the course of human events and the economic situation in this country unfortunately it is worse than a toy balloon, he may be up today and down tomorrow, so we are not taking anything away

from him, he may be running a train today and by virtue of no business he would be demoted.

"Q. Do you still have the same seniority rosters for road passenger brakemen and road freight brakemen?

"A. Yes, sir."

The Court: We will recess now until two o'clock this afternoon.

Whereupon, the Court stood at recess until two o'clock p. m. of said Monday, October 14, 1946.

Afternoon Session, Monday, October 14, 1946.

Pursuant to adjournment as aforesaid, at 2:00 o'clock p. m. of said date, the court met, present and presiding as before, and the trial proceeded as follows:

The Court: All right, gentlemen.

Mr. Packman: If Your Honor please, Plaintiff's Exhibit 13 was handed to you without specific references. We direct your attention to page 20, which mentions Case No. 5, which was at issue.

The Court: What is it?

Mr. Packman: Exhibit No. 13.

The Court: What page is it?

Mr. Packman: Page 20, the item in reference to Case No. 5, which reads: "Request that whenever it becomes necessary to increase the force in train, engine or yard service, only white men shall be employed. We only use colored employes in train, engine and yard service in a section of the country where it is common, where all of the railroads use this class of employes, and I do not see any necessity for your request or any justice in it, and I shall have to decline this request."

That is contained in a letter sent to the four brotherhoods under date of February 24, 1928, signed by Mr. J. E. Hutchinson, who was at that time Vice-President of the Frisco Lines.

The Court: All right.

Mr. Packman: I direct your attention to page 68, which is supposed to be a summary of "Agreements made by notes from both parties, reduced to type", the caption, "Schedule Cases". It states in reference to Case No. 5: "This case settled by separate agreement, signed on behalf of both parties."

J. M. TILLMAN,

being produced, sworn and examined as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

By Mr. Packman:

Q. State your name. A. James—J. M. Tillman.

Q. Where do you live? A. Oklahoma City.

Q. What is your employment? A. Trainman.

Q. For what railroad? A. Frisco.

Q. How many years have you been employed as a trainman? A. Twenty-three years.

Q. Prior to that time were you associated with the railroad "end" work?

A. Employed twenty-nine years for the railroad company, and in the capacity of train service twenty-three years.

Q. During your periods of employment with the railroad, particularly as trainman, have you had occasion to know the duties and the functions performed by various men on the trains? A. Yes.

Q. From company lines? A. Yes, sir.

Q. Are you presently assigned to any particular run? A. Yes, sir.

Q. Where?

A. Three and four, between Oklahoma City and Monett, Missouri.

Q. Do you know the conditions of the assignments prior to the run getting to your divisional points, what follows after you get off? A. Yes, sir, I do.

Q. Are you also familiar with what occurs at other junctions or divisional points? A. Yes, sir.

Q. So far as the manning of the trains and the services performed by respective crew members?

A. Yes, sir, I am.

Q. Do you remember the time when Negroes were on both ends of a train, doing flagman work as well as head end work? A. Yes, I do.

Q. About when was that?

A. That was prior to the time I entered train service. I was also in the service of the company at that time, but that was before I was employed into the service of train service; that is, along back in 1917, '18, about 1917, I believe, when I first was hired by this company.

Q. Did you obtain your information from observation, actually seeing it done? A. Yes.

Q. Since when is it that Negroes are not doing tail end work, back end work?

A. Well, for me to notice it, it was along about 1920.

Q. Was that right after the equalization of pay resulting from the First World War went out?

A. Yes, it was.

Q. You heard Mr. Howard testify as to the duties that he performs as a so-called train porter; are you called a train porter as well as referring to yourself as a trainman? A. Yes, sir.

Q. Where did you get that reference to the word trainman?

(Book of rules, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 14, 10/14/26, OP".)

Q. (By Mr. Packman) I show you our exhibit 14, and ask you whether you, as a trainman, received a copy of such rules? A. Yes, I did.

Q. Is there any page reference there wherein porters are classified as trainmen? A. Yes, sir.

Q. Would you look at page 6, if my memory serves me correctly; I direct your attention to the last sub-paragraph of No. A in the middle of page 6. Would you kindly read that out loud?

A. I beg your pardon, I didn't understand.

Q. I asked you to read this paragraph here, beginning with the word "the".

A. "The designation of trainman or trainmen in any

rule includes conductor, brakeman, yardman and train porter when applicable."

Q. Now, is there anything there which specifically refers to your duties as trainman, separate and distinct, telling you what rules you should study as a train porter?

A. No, sir.

Q. Or what you should study as a brakeman? A. No, sir.

Q. Did you ever have occasion to ascertain the attitude of the Brotherhood of Railroad Trainmen toward Negro trainmen? A. Yes, I did.

Q. What was the occasions and times?

A. From time to time I have consulted many of the trainmen and feeling them out, seeing if there was a possibility for us to join their organization.

Q. You talked to members of the Brotherhood of Railroad Trainmen? A. Yes, I did.

Q. White men? A. Yes, sir.

Q. What did they say to you?

A. They said no Negro was permitted to join that organization.

Q. Did they ever discuss with you the question of jobs and assignment of jobs? A. Yes, they did.

Q. What did they say to you about that?

A. Well, on certain runs, where white men had attempted to take the run from colored men, I would ask him if he felt that it was dealing the colored man—a citizen of this United States—justice in doing this. I was only told they was a white man's job and not a Negro's job.

Q. Are you a member of any organization of which other Negro trainmen are members? A. Yes, I am.

Q. What is the name of that organization?

A. Brotherhood of Railroad Trainmen, Porters, Switchmen—

Q. Is that membership confined to employes of the Frisco Railway? A. No, sir.

Q. Did you hear any discussion of the attitude of the Brotherhood of Railroad Trainmen from any of their members as to Negro trainmen running on streamliners which may be put on running order around the first of this year?

A. Yes, I did.

Q. What did they say?

A. They said to me often, why, they would expect to put streamline trains on around the first of the year and

they felt that heavy work would be over with and the nice jobs would take place, and they said to me, "You will never get a chance to work on a train like that."

Q. On an air-conditioned train there is less work to do of cleaning than on the old type of trains? A. Yes, sir.

Q. This organization to which we referred, why, did you join it?

A. Well, there wasn't any other organization that we could join for our protection. We did the very best we could.

Q. You say "your protection"; what happened that made you think you needed protection?

A. Whenever the white brotherhoods wanted to take a job we had no one to represent us, that is, when the Brotherhood of Railroad Trainmen refused to represent us. We had to resort to some organization for our protection, that is, to represent us partly, even if not wholly, that is, before the management of the railroad.

Q. How many years have you been a member of this defense organization?

A. Oh, ever since it was organized, not very many years, about three or four years.

Q. Were you a member of a predecessor organization previous to that time? A. I was.

Q. How many years were you a member of that?

A. Possibly three or four years.

Q. Before then was there still another self defense group of Negro employes that you tried to affiliate with?

A. That organization, what we had then was just merely a company organization.

Q. What was that?

A. The reason I say it was a company organization is because at that time we had no general chairman elected according to the railway labor act by the men. We only had a general chairman that was appointed by the railway company. His name was Sandy Eslinger.

Q. Did you feel that the general chairman of the B. of R. T. would handle your grievances? A. No, sir.

Q. Were you aware of the agreement in 1928?

A. Yes, I was.

Q. When did you first learn about that?

A. I first learned about that through the general chair-

man, I believe the conductor sometime later in talking with him.

Q. Were any members of your organization or any of your fellow workers invited to attend any meetings that led up to the signing of that agreement of March 14, 1928?

A. No, sir.

Q. Were you aware of the violence which some Negro trainmen suffered at the hands of the B. of R. T. members right after the First World War? A. Yes, sir.

Q. What were the conditions then?

A. Well, the primary condition existed on several divisions of this railroad where when Negroes were permitted or even holding the present positions, their present positions, why, the white fireman would—I think first when we was noticing that, and then the trainmen, they was attempting to assassinate or either shoot them off trains.

Q. Were you aware of assassinations that occurred?

A. Only read about it, that is all I know about it, in the papers, that is all I know about it.

Q. Did word go out, passed on by members of the B. R. T. that you fellows had better stick to your broom and to your present jobs and not look for any trouble?

A. Several times I have heard them say that to me.

Q. Were those the reasons the Negroes banded together in order to get some measure of unified relief?

A. I think that is.

Q. Is any organization sponsoring this particular lawsuit? A. No, sir.

Q. Do you know who is helping to finance it?

A. Churches and other different auxiliaries.

Q. And men who work on the railroad?

A. That is right.

Q. Is that confined to the workers of the Frisco Railway? A. No, sir.

Mr. Packman: Take the witness.

Cross-Examination.

By Mr. Judge:

Q. How long have you been employed on the Frisco, Mr. Tillman? A. On train service, twenty-three years.

Q. How have you been classified during that time?

Mr. Packman: By whom?

The Witness: I have been classified by the railroad.

Q. (By Mr. Judge) Yes.

A. I have been classified by the railroad as train porter.

Q. You have been carried on seniority rosters as a train porter? A. Well, such seniority roster as it is.

Q. You are familiar with those seniority rosters, are you not? A. Yes, sir.

Q. You have seen your name on seniority rosters?

A. Yes, sir, I have.

Q. On train porters' seniority rosters?

A. Yes, sir, I have.

Q. You know there are separate seniority rosters for a brake man? A. You are asking me a question?

Q. Yes. A. It is.

Q. And your name doesn't appear on the brakeman's seniority roster?

A. No colored man appears on that on this division I am on.

Q. Not on your division? A. That is right.

Q. You wouldn't say that on other railroads?

A. I am only saying that on the division I am on, no, sir.

Q. Mr. Tillman, you are paid a different wage scale, are you not, than brakemen? A. That is true.

Mr. Packman: You mean white brakemen when you say brakemen?

Mr. Judge: I said brakemen.

A. I mean white brakemen.

Mr. Packman: I want to have his answer qualified if you mean brakemen.

The Court: He is testifying, you will have your time to ask any questions. Let him examine the witness. Go ahead.

(Trainmen's Schedule, handed to the reporter, was marked for identification as "Brotherhood Exhibit 2, 10/14/46, O. P.")

Q. (By Mr. Judge) Mr. Tillman, I show you what has been marked Brotherhood Exhibit 2, which purports to be

a Trainmen's Schedule, and ask you if you are familiar or have ever seen that before? A. Yes, I have.

Q. I refer you to Page 7, where the heading appears, "Conductors' and Brakemen's Schedule" and then refer you further to Page 8—turn it over, please. A. Yes.

Q. The scale of wages paid conductors and brakemen, and ask you if that provision or any provision therein that you know of is applicable to you as a train porter.

A. Yes, sir, it is.

Q. What is the wage schedule in here applicable to you?

A. The only thing not applicable to me there is just pay schedule, rate of pay, and that is solely on account of my color.

Q. Do you know, Mr. Tillman, that this trainmen's schedule is the contract between the Brotherhood of Railroad Trainmen and the Order of Railway Conductors with the railroad covering the pay and working conditions of brakemen and conductors?

A. I can't say anything about the conductors because I know nothing—we are not permitted to be in any of the conducters' meetings or anything, and I wouldn't know anything about what they have got between the company.

Q. Well, have you read this schedule over?

A. The only way we read one, we have just got to steal one from some brakeman. He wouldn't give it to us.

Q. If there is a violation of a working condition in this schedule, so far as you are concerned, would you feel that you have a claim against the railroad under this schedule?

A. I would feel I had a claim not only against the railroad but against you because you won't permit me to join your organization.

Q. Under this schedule, though, would you have a claim against the railroad, that is my question, Mr. Tillman.

A. Well, that will be answered by my attorney. I wouldn't care to answer that.

Q. You wouldn't answer that? A. No.

By Mr. Baumann:

Q. Mr. Tillman, about what time did you become a train porter on the Frisco Railway, about what year?

A. December—I believe it was December 12, 1923.

Q. Prior to that time, what kind of service were you engaged in?

A. I was engaged in station work and section work.

Q. At what point? A. Tulsa and Oklahoma City.

Q. Now, with respect to what division of the railroad did you enter service as a train porter?

A. Southwestern Division.

Q. At the time you became a train porter, was Mr. Eslinger then considered general chairman on behalf of train porters? A. Yes, sir.

Q. He represented you in your grievances with the company? A. That is true.

Q. How long did he represent you?

A. I am not able to tell you exactly because I don't have my file here with me.

Q. Approximately how many years?

A. I just couldn't say because it was quite some time.

Q. And after he ceased representing you as general chairman, what person or group or organization represented you in connection with your labor contract with the Frisco Railway?

A. The first one representing us was the trainmen, brakemen and porters' union, that was affiliated under the A. F. of L., I believe.

Q. Was your present organization the immediate successor to that organization?

A. The one we have got now, yes, sir.

Q. You made a statement before that at one time you recall that rear end as well as the head end of passenger trains were covered by colored brakemen; can you tell us a little more about that? A. I didn't say brakemen.

Q. Porters.

A. Train porters? just the same as you call them now, trainmen, but you call them train porters. There wasn't a brakeman on the train at that time. I was not on your train then.

Q. Was that beyond the service? A. Yes, it was.

Q. How did you learn of that fact?

A. I was working for the company at that time.

Q. What time? A. Tulsa, beginning at 1917.

Q. As long as you have been in the service of the railway as a train porter, have you always been on a separate roster headed "train porters"?

A. Since I have been on, yes.

Q. As long as you have been there? A. Yes, sir.

Q. As long as you have been a separate roster. For what division? A. Southwestern Division.

Mr. Baumann: All right, thank you, sir.

The Court: Are there any white men in the service doing the same work you are doing?

The Witness: Yes, sir.

The Court: What rate of pay are they getting?

The Witness: They are getting the standard rates, probably the difference between rates of pay of white men and Negroes range from fifty to one hundred dollars a month.

The Court: And they are doing identically the same work?

The Witness: Identically the same work. I have taken the train off one and two for many years.

The Court: Same title?

The Witness: They call—white men are called brakemen where we are called trainmen.

The Court: I am talking about the same classification.

The Witness: Yes, sir.

The Court: Same classification, that is, trainmen and porters?

The Witness: Yes, sir, trainmen.

The Court: And you have white men doing that work, porters, trainmen? I don't mean classified as brakemen, I mean the same classification that you have?

The Witness: Well, now, you would have to explain to me about the classification because they have so many different classes.

The Court: You know what your own classification is?

The Witness: Yes, sir.

The Court: On the records of the company. Do you know what your salary is?

The Witness: Yes, sir.

The Court: What I want to know is whether or not there are any white men who are classified just as you are; I don't mean as brakemen, now, but classified as a trainman and a porter.

The Witness: No, sir, not that I know of.

The Court: All right. Is that all, gentlemen?

Mr. Packman: Just one question.

Redirect Examination.

By Mr. Packman:

Q. I direct your attention to Page 8 of this exhibit that was presented to you by Mr. Judge, Brotherhood's Exhibit No. 2, and ask you to read under the caption, "Rates of Pay" what it says there, rates for what? A. Article 3?

Q. No, no. This line here (indicating). A. Oh, yes.

Q. What does it say?

A. "Rates for trainmen on trains propelled by steam or other motive power:"

Q. Now, the trains that you run on, are they steam trains? A. Yes, sir.

Q. Did you have any voice in the preparation of this book? A. Not any.

Q. Or of the rates? A. No, sir.

Q. Was anybody ever asked to pass on any strike ballots because of any complaints about rates by the Brotherhood?

A. No, sir.

Q. B. R. T. or any other brotherhood?

A. No, sir, not anything, any connection with the organization.

Mr. Packman: That is all.

(Witness excused.)

Mr. Baumann: If your Honor please, this morning carriers presented their Exhibit A, a letter from Simon Howard to P. O. Woods.

The Court: Yes, sir.

Mr. Baumann: With consent of counsel, I would like to substitute a copy since this is part of our permanent records.

The Court: Very well.

C. P. KING,

being produced, sworn and examined on his own behalf, testified as follows:

Direct Examination.

By Mr. Packman:

Q. Full name, please? A. C. P. King.

Q. Where do you live? A. St. Louis.

Q. What is your present occupation?

A. Assistant to Chief Operating Officer of the Frisco Railway.

Q. How long have you been such an assistant?

A. Since November 1, 1939.

Q. Prior to that time what was your affiliation with the Frisco lines?

A. Assistant to the General Manager at Springfield, Missouri.

Q. How many years?

A. As Assistant to the General Manager?

Q. Correct. A. About nine years, as I recall.

Q. Prior to that time what was your official title?

A. My official title was Assistant Chief Clerk, General Manager's Office, and also there was a period of one year between periods of Assistant to General Manager when I was Chief Clerk in the General Manager's office.

Q. What is the sum total of your association with the Frisco lines? A. More than, over thirty-six years.

Q. In connection with your present occupation with the Frisco lines do you have charge of personnel and personnel problems? A. I do.

Q. Do you have access to the official files of the Frisco system which throw light upon your duties and responsibilities and records of what occurred in the past? A. I do.

Q. You have with you files which go back as far as 1918—I am particularly interested in a letter marked "personal" from J. M. Kurn to Messrs. Higgins and Carr, under date of June 4, 1918.

A. Our files go back that far, yes, sir.

Q. Did you find that letter, it starts off "On No. 9, Eastern Divn., June 4, 1918"?

A. I have such a letter, yes, sir.

Q. Marked "personal" at the top? A. Yes, sir.

Q. Can we have the original there marked King's Exhibit No. 15. I think we will mark them in sequence. We are going to mark the original and we are going to substitute copies if it is agreeable to you.

Mr. Baumann: Yes.

Mr. Judge: Yes.

Mr. Packman: Shall we deem that it is marked, and we will mark them all later on at one time.

Q. Who is the man that signed the original of that letter, signed J. M. Kurn, or do you have the original there?

A. I have Mr. Carr's copy of that letter which is signed by Mr. J. M. Kurn.

Q. Is it "G" or "J"?

A. "J", James M., who was at that time General Manager.

Q. Who was Mr. C. C. Higgins, if you know?

A. He was at that time Superintendent of Motive Power.

Q. Who was Mr. R. F. Carr?

A. Assistant General Manager.

Mr. Packman: At this point, your Honor, we desire to offer that exhibit, adversary counsel have had access to that file and copies made up, and I will read from my copy, and you read from yours while I read it.

(Plaintiff's Exhibit 15.)

"On No. 9, Eastern Divn., June 4, 1918.

(personal)

Messrs.

C. C. Higgins

R. F. Carr.

Calling attention to Article No. 6, General Order No. 27. You will note that colored men employed as firemen, train-

men, and switchmen will be paid the same rates as paid white men in the same positions.

Under this ruling there may be a tendency on the part of some of our officers to dispense with colored men. You will please have an understanding with General Superintendents, Superintendents, Assistant Superintendents, Master Mechanics, etc., that don't want any change made whatever in our present system. Want all of the colored employes retained and in the territory in which they are now employed, and when there are any vacancies, I want the vacancies filled with colored men, same as we have been doing in the past. So that there will be no misunderstanding, am asking that you kindly arrange to have them acknowledge receipt of your instructions, and so that my file will be complete I would like to have copy of their acknowledgment. There cannot and will not be any deviation from these instructions without authority from the undersigned.

With this high rate of pay we should be able to secure the very best kind of colored employes, and we should be able to increase the efficiency of the firemen on the Southern Division by selecting a very high grade of firemen, and in this manner secure greater efficiency and economy in the use of fuel.

Please acknowledge receipt.

(Signed) J. M. KURN."

Q. Do you have as part of your master file there a letter of January 6, 1919 which we have marked King Exhibit No. 11 in connection with a deposition—correcting that, it is under date of September 26, 1919. Who is that letter signed by?

A. I have a letter dated September 26, 1919, addressed to Mr. J. M. Kurn, General Manager of the Frisco Railway, signed by Mr. E. E. McGuire, Chairman.

Q. Is that on stationery of any organization?

A. It is on the stationery of the Brotherhood of Railroad Trainmen of the United States and Canada, General Grievance Committee.

Q. Who does it purport to be signed by?
A. Mr. E. E. McGuire, Chairman.

Mr. Packman: We desire to offer that in evidence, Your Honor, the same general statement, substituting copies. I shall read it.

The Court: Received in evidence.

(Plaintiff's Exhibit 16.)

Dear Sir:—

Your file 2369-T, complaint Train and Yard men East of the Mississippi River asking that seniority rules be applied to colored train and yard men, which was referred by joint statement of facts to Railway Board of Adjustment No. 1 under date of January 10, 1919, and which has been handled with the Director General and the Director Division of Operation in Washington, D. C. on two or three different occasions since we referred this to the Board.

In order to bring about a settlement of this matter at the earliest possible time, Mr. W. G. Lee, in conjunction with a special committee created by our convention, took the question up with Mr. W. T. Tyler, Director Division of Operation, of the U. S. Railroad Administration, July 3rd, and discussed it briefly with him. He advised Mr. Lee and this special committee that the matter would have to be handled direct with Mr. B. L. Winchell, Regional Director, Southern Region, who was authorized to handle the question to a conclusion.

An officer of the Brotherhood of Railroad Trainmen met Mr. Winchell at his office in Atlanta July 7th. At this conference a mutual understanding was reached that discrimination would be corrected, but it was agreed the question should be taken up with the Federal Managers of the Railroads on which discrimination was practiced, in order to develop the facts, and if a settlement could not be reached on such roads, it would then be in order to appeal to Mr. Winchell.

The General Grievance Committees on several of the railroads in the Southern Region were convened and took the question up with the Federal Managers of such roads,

with the result that a satisfactory agreement was reached with all of the roads except the Central of Georgia, and in that case an appeal was taken to Mr. Winchell and the following agreement was reached:—

"August 27, 1919.

"Referring to our conference this morning; I am sending copy of this letter to Federal Manager Winburn with request that he promptly place in effect the understanding which I am here outlining, in respect of train and yard service.

"1. All men entering the service on and after September 1, 1919, to fill positions of brakemen, flagmen, baggagemen and switchmen will be subjected to and required to pass uniform examinations and comply with the regulations as to standard watches and to know how to read and write.

"2. Discipline will be applied uniformly, commensurate with the facts in the case, without distinction as to color.

"3. When train or yard forces are reduced, the men involved will be displaced in the order of their seniority, regardless of color. When a vacancy occurs, or new runs are created, the senior man will have preference in choice of run or vacancy, either as flagman, baggageman, brakeman, or switchman; except that negroes are not to be used as conductors, flagmen, baggagemen or yard conductors.

"Negroes are not to be used as flagmen, except that those now in that service may be retained therein with their seniority rights.

"White men are not to be used as porters; no porter to have any trainman's rights except where he may have established same by three months continuously in freight service.

"4. Any rules, regulations, or agreements in conflict with the foregoing are null and void.

"In addition to the above four paragraphs, I am also advising Mr. Winburn that I have reached an understanding with you that trainmen *Now on the extra board* will be permitted to select runs or positions, in accordance with their seniority, but that such selections must be made on or before September 15, 1919, after which the four provisions mentioned above in this letter will be strictly adhered to."

I am ready to proceed to settle this question with you by reaching a like or similar agreement, and trust you will arrange for meeting at an early date.

As I see it, Item 3 in the above Agreement also takes care of the matter I referred to you July 1st, 1919—Passenger Train Porters given rights and classed as Passenger Brakemen—your letter to me August 9th, file 1625-15. I desire to discuss this feature of the subject with you in connection with the above matter.

Yours turly,
(Signed) E. E. McGUIRE,
Chairman."

Q. Kindly refer to File No. 1625-15 and give me—if you have the correspondence referred to, it is not included here with our transcript—if you have to go for it I can pass on to another matter, Mr. King; if it is not in the courtroom I will pass on it and make a note.

A. I do not have that file available.

Q. Well, I now refer you to a letter of October 6, 1919, King No. 12, that will be our No. 17. Have you found it?

A. Yes.

Q. That is a letter addressed to Mr. J. S. Pyeatt, signed by Mr. J. M. Kurn. Do you have the office copy of that letter? A. I have it.

Q. Who is Mr. Pyeatt?

A. I have the original office carbon. Mr. Pyeatt was Federal Manager, I believe, at that time. That was during Federal control.

Mr. Packman: We offer that Exhibit No. 17 in evidence. I will read it.

(Plaintiff's Exhibit 17.)

"As you know, on January 10th, we submitted joint appeal with ORC and BofRT as to question of train and yard men East of Mississippi River, requesting that seniority rules be applied to colored train and yard men.

As yet we have received no decision and it is my understanding that the case was not passed to the Board for handling. Am attaching copy of Mr. McGuire's letter of September 26th which is self explanatory. You will note he quotes agreement made by Mr. Winchell in Southern Region. In conversation with Mr. McGuire he states that Mr. Tyler informed him that whatever decision was reached by Mr. Winchell on this subject would apply equally to all roads.

Shall be obliged if you will kindly advise just what action we shall take in the premises.

As you are also aware, Mr. McGuire has made request that all colored men on passenger trains who are now receiving the brakeman's rate of pay, should also be included on same seniority list with other brakemen. He makes reference to this in last paragraph of his letter. If it is decided that the agreement reached with Mr. Winchell in Southern Region is to apply on this line, should like to be advised whether or not it will also include colored men on passenger trains who are now being paid the brakeman's rate in accordance with provisions of Supplement No. 12.

(Signed) J. M. KURN."

Q. Do you know who he was referring to when he avoided designating the men as train porters or as brakemen?

A. I don't know that I understand your question, Mr. Packman.

Q. This last part of this comment, if you will follow me, he states, "If it is decided that the agreement reached with Mr. Winchell in Southern Region is to apply on this line, should like to be advised whether or not it will also include colored men on passenger trains who are now being paid the brakeman's rate in accordance with provisions of Supplement No. 12."

A. I am sure that referred to train porters.

Q. Now, what was Supplement No. 12, which is adverted to there?

A. Supplement No. 12 was a supplement to General Order No. 27, issued by the Director General of Railroads.

Q. To what effect?

A. I don't have a copy of it in front of me, but the general effect of it was that any man in train service performing work such as throwing switches and flagging and so on, generally recognized as brakemen's duties, would be paid the brakeman's rates.

Q. Was it recognized as a result of that Directive that Negroes who were doing that work were entitled to a larger pay scale than they had been enjoying? A. It was.

Q. And their wage rate was raised to the standards of white men then, correct?

A. Yes, they were paid the same rate as passenger brakemen.

Q. Given the same pay, no more or less than a brakeman? A. That is right.

Q. A white brakeman? A. That is correct.

Q. Now, I direct your attention to a letter signed by J. E. Hutchison under date of August 12, 1921, Exhibit No. 14, gentlemen. We offer that in evidence, Your Honor, and I shall read it. We will call that 18.

The Court: It will be received in evidence.

Mr. Packman: Under date of August 12, 1921, written from Springfield, I assume Missouri.

(Plaintiff's Exhibit 18.)

"Mr. J. M. Kurn:

Your letter August 10th addressed to Will H. Harris, replying to his letter August 7th, relative to contract with colored train and yardmen.

Your letter says Birmingham Belt, but I am quite sure that their request is for the entire Southern Division. These men called on me and what they want is to go back to the old arrangement, that is, the colored brakemen to be known as brakemen, the white men as flagmen, the colored men to have and hold the head end and swing jobs, and the flagman the rear job on all trains; and they want to accept a material reduction in wages as compared with the white brakemen.

I do not see how this possibly could be done. When they called on me I stated to them that conditions were such just at this time there was nothing that could be done in the matter; that the matter would be given careful thought and attention and if conditions changed we would be glad to consider their request.

I do not see how I can state anything definite to them at this time; however, I would like your advice before putting anything in writing further.

(Signed) J. E. HUTCHISON,
General Manager."

Q. Is there anything in the file to clear up the reference "I do not see how this possibly could be done"? Was he referring to lowering their wages or to the designations there, in that letter?

A. Well, in answer to that question, I think it might be well to state that the men Mr. Hutchison is referring to are men in freight service. They were put on the same seniority roster as the white brakemen and paid under the same schedule of rates and working conditions as the white men, and Mr. Hutchison simply meant it would not be possible to segregate the white and colored men and make a different set of rates and working conditions for the white man and colored man.

Q. You say it refers to the freight brakemen?

A. That is right.

Q. Weren't they known as brakemen before? A. Yes.

Q. Is that the language for this—the meaning of this language, "These men called on me and what they want is to go back to the old arrangement, that is, the colored brakemen to be know as brakemen,"—doesn't that imply they were known as something else and not limited to freight brakemen?

A. No, it does not. Mr. Hutchison in that letter is distinguishing between some terms that were used more or less locally on the lines east of the Mississippi River between flagmen and brakemen. Prior to that time, the white men generally had the rear end jobs and were commonly known among the railroad men in that territory as

flagmen. The Negroes had the head end or swing jobs and were more generally known as brakemen.

Q. Well, then, it is a fact that the thing that made the job was not the name but the work they did, correct?

A. Well, that differentiation between flagmen and brakemen is more or less a local colloquialism, you might say.

Q. I don't know if you go to my question. The thing, though, that made the true classification is not what they were called but what they did to establish a true category of the craft—you have heard that old barb about the rose by any other name would smell the same?

A. I have heard that—but the way it was handled then was that the white man could work on the hind end or the head end of the swing job, but the practice was that they did not let the Negro work the rear end job which is known as flagman.

Q. Why? A. Just an old custom down there.

Q. Southern custom? A. Southern custom.

Q. I refer you now to a memorandum signed by A. H. Jones, addressed to Mr. T. A. Hamilton, under date of August 21. It will bear our Exhibit No. 19.

A. I have such a memorandum.

Q. Who was Mr. A. H. Jones, if you know?

A. He was Supervisor of Wages.

Q. And who was Mr. T. A. Hamilton, to whom it is addressed? A. At that time he was Vice-President.

Q. The job which Mr. Hutchison subsequently succeeded to? A. Yes, sir.

Mr. Packman: That is our Exhibit 19, offered in evidence, Your Honor. I shall read it. Shall I assume, Your Honor, that it is agreeable unless I hear to the contrary?

The Court: Yes, received in evidence.

(Plaintiff's Exhibit 19.)

"Memo to Mr. T. A. Hamilton:

Mr. Hutchison's letter of August 12th attached:

It is my judgment the position he has taken is correct. As the BRT represent a majority of the brakemen and yardmen on the property, do not see how it would be pos-

sible under various rulings of the Labor Board to negotiate a separate agreement with colored brakemen and yardmen."

Q. Do you know whether that was the legal explanation as to why the designation of these men was changed from one thing to another, why they were called train porters rather than trainmen or perhaps brakemen?

A. This has nothing to do, as I understand it, with train porters. It has to do with the freight brakemen as referred to in Mr. Hutchison's letter of August 12, 1921.

Q. Is there something in the file which positively identifies this, referring exclusively to freight brakemen?

A. Well, I wouldn't say that there was, but from the general knowledge of conditions then, it is my firm conviction that that is what it was.

Q. Isn't it a fact that during the war period of the First World War that the train porters were being recognized as being entitled to a brakeman's pay because of the duties they performed? A. That is correct.

Q. And was there a set of wages on the same standard as that negotiated by the B. R. T. for brakemen?

A. That is true, but they were still continuing—or carried as train porters.

Q. Now, kindly look at a letter from Mr. Kurn and addressed to Mr. Hutchison under date of August 17, 1921. Do you find it? A. Yes, sir.

Mr. Packman: That will be our Exhibit No. 20. I offer it in evidence, Your Honor.

The Court: Received in evidence.

Mr. Packman: I shall read it.

(Plaintiff's Exhibit 20.).

"Mr. J. E. Hutchison:

Yours of August 12th, file 1630-7, reference to mine of August 10th—request of colored brakemen on the Southern Division to go back to the old arrangement, they to be known as brakemen and hold the head end and swing

jobs and the white brakemen to hold the rear job on all trains.

The position you have taken is correct. As the Brotherhood of Railway Trainmen represent a majority of the brakemen and yardmen on our lines, do not see how it would be possible, under various rules of the Labor Board, to negotiate a separate agreement with the colored brakemen and yardmen. The statement you made them, as indicated in the third paragraph of your letter of August 12th, is quite correct.

(Signed) J. M. KURN."

Q. Do you have a letter under date of September 18, 1926, addressed to Mr. Baltzell, signed by Mr. J. E. Hutchison? A. Yes, sir.

Q. Who is Mr. C. H. Baltzell, if you know?

A. Mr. C. H. Baltzell at that time was a superintendent for the Frisco Railway, but without checking the records, it is my impression that at this particular time he was on detached duty.

Q. At that time, in 1926, to what title had Mr. J. E. Hutchison been elevated? A. Vice-President.

Mr. Packman: That is our Exhibit No. 21. We offer it in evidence. I shall now read it. Mr. Baltzell, addressed to 206 Democrat Building, Little Rock, Arkansas.

(Plaintiff's Exhibit 21.)

"Your letter September 17th relative to displacing colored porters on passenger trains.

There has been for years a determined effort on the part of the train service employes to get the colored men out of employment on our trains and engines and they have done everything that they could to accomplish this. During the time of Federal control an interpretation of seniority was gotten from governmental source and applied to all the railroads, which made all of the men in train and engine service be handled on one seniority list. In view of the fact that local sentiment made it impossible for us to

work a colored brakeman as a flagman it was necessary for the colored brakeman to always work ahead. The men tried by means of this seniority arrangement to crowd these men out of service and did crowd a good many of them out. This is just one of the many efforts.

There have been frequent efforts of one kind and another made to displace the colored porters on the trains but the white men have never been quite willing to take over the work that the colored men do and whenever it came to an issue they have usually side-stepped it some way or another.

Yours very truly,

(Signed) J. E. HUTCHISON."

Q. See if you have a letter there under date of March 15, 1928, King No. 22. A. March 15, 1928.

Q. March 15, 1928. Found it?

A. I have such a letter, yes, sir.

Q. That will bear our Exhibit No. 22. Is that marked "Personal" in some manner? A. It is.

Q. Signed by Mr. J. E. Hutchison?

A. I have an original file carbon and it shows it was signed by J. Hutchison.

Q. Do you know what happened on March 14, 1928—this letter bears the date of March 15—did it have anything to do with the employment of Negroes on the railroad?

A. This letter, March 15, 1928, to Mr. F. H. Shaffer and Mr. H. L. Worman has reference to an agreement made with the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Enginemen and Firemen, Order of Railway Conductors and Brotherhood of Railroad Trainmen on March 14, 1928, which provided that on and after that date we would not hire any more Negroes in train engine and yard service but not including train porters.

Q. Who was Mr. Shaffer at that time, F. H. Shaffer?

A. Shaffer, General Manager.

Q. Who was Mr. H. L. Worman?

A. He was then Superintendent of Motive Power.

Q. Is he your superior at this time? A. He is.

Q. What is his present title? A. Chief Operating Officer.

Mr. Packman: Our Exhibit 22 is being offered.

The Court: Received.

Mr. Packman: I shall read it.

(Plaintiff's Exhibit 22.)

"I hand you herewith copy of agreement made with the organizations relative to Case No. 5, which has to do with employment of negroes as firemen, brakemen and switchmen on the lines south of Memphis.

This agreement was dictated by Federal Mediator Morrow and as you will note it is signed by everybody concerned.

This means that we must not hire any more negro employes. Those that are with us are to stay, but when we need new men we will hire white men.

You should not give this any publicity at all. You should just simply call in your men who are charged with this duty and tell them what they are to do and whenever there is a change in officers that employ men in that territory they must be very carefully instructed. There must be no failure to carry out this matter.

If there might have been any negroes employed in these capacities on yesterday, March 14th, today, March 15th, or any day up to the time that you can get these instructions out, such employes should be dispensed with.

I want to carry this out in good faith and then we want to see that the men carry out their agreement with us in good faith. If there is any attempt to intimidate, terrorize, or in any way get rid of these employes, we should be advised quickly so that we can take proper action.

Wish you would give me your personal acknowledgment and I wish you would personally see that instructions in this matter are very carefully carried out. This is something that can be handled successfully if we go about it in

the right way or it can result in very bad state of affairs if it is handled without discretion.

(Signed) J. E. HUTCHISON."

Q. Do you have a letter probably in ink or pencil under date of April 7, 1928, addressed to Mr. J. M. Kurn from Memphis, Tennessee, King Exhibit 24, I am referring to, gentlemen, that will be our No. 23. Do you have it?

A. I have it, yes.

Q. That will be our Exhibit No. 23. And do you have there a letter under date of April 11, 1928 from Mr. Kurn to the gentlemen who purports to sign that letter?

A. I have a file carbon of such a letter.

Q. That will become our Exhibit No. 24. And do you have with you a letter dated 4/14/1928, signed by Limit Brown to Mr. J. E. Hutchison? A. I do.

Q. That will be 25. And do you have a letter under date of April 19, 1928 addressed to Mr. John James by Mr. J. E. Hutchison? A. Addressed to who?

Q. To Mr. John Jones, the way it reads here. Perhaps the stenographer made a mistake. It is King Exhibit 23, to someone down in Amory, Mississippi. Do you have that? A. Yes, yes, I have that.

Mr. Packman: Would your Honor give me a moment's time to make sure? I don't want to get snarled.

Q. Do you have a letter there under date of April 18, 1928, addressed to Mr. J. E. Hutchison, by Mr. F. H. Shaffer, that is King Exhibit No. 26. Do you have all of those letters to which I referred?

A. I have a letter dated April 18, 1928, from Mr. F. H. Shaffer, General Manager, to Mr. J. E. Hutchison.

Mr. Packman: We offer in evidence our exhibits 23, 24, 25, 26 and 27.

The Court: Received.

Mr. Packman: If Your Honor please, may I proceed to read?

The Court: Yes, proceed.

Mr. Packman: From Exhibit No. 23, to Mr. J. M. Kurn, under date of 4/7/1928.

(Plaintiff's Exhibit 23.)

"President of S. F. L. and S. F. R. R.

Dear Sir.

We the undersigned colored [Mieght] brakemen of the Tupelo and Birmingham Sub. Div. wish to petition your sovereignty by asking you farther privilege to meet you in a personal conference which is of a very serious nature and vital interest to us. Dear Mr. Kurn, we feel with all due respect to our superior officials that you are our only refuge in this most [terriable] calamity that has happened in the history of this your magnificent rail road. hoping that you will give this your earliest attention. Yours truly,

LIMIT BROWN,	Gen.	Chr.	17	yrs.	Service
JIM JUDGE	Loc.	"	13	-	-
ALIE SMITH	Loc.	"	14	-	- "

Mr. Packman: Exhibit No. 24, addressed to these gentlemen by Mr. Kurn.

(Plaintiff's Exhibit 24.)

"Gentlemen:

Your letter of April 7: Am sorry, but it is impossible for me to handle labor matters—all of this is handled by Mr. J. E. Hutchison, vice-president, and know he will be glad to give you a conference if you will take the matter up with him. He is thoroughly familiar with the subject you want to discuss, and know he will be glad to discuss it with you fully and give you the full history of the case.

We appreciate your loyal service, and sincerely hope it will continue."

Q. Then on the bottom of the office copy is there something written by Mr. Kurn, typed on? A. There is.

Mr. Packman: "Mr. Hutchison: Am passing you the entire file. Suppose this is account last deal made with the Big Four. J. M. K:"

Q. Those are Mr. Kurn's initials? A. Yes, sir.

Mr. Packman: At this juncture, Your Honor, I am going to read our Exhibit No. 27—refer back to the others later. Letter signed by Mr. F. H. Shaffer, General Manager, marked "Personal" on the top, to Mr. J. E. Hutchison, under date of April 18.

(Plaintiff's Exhibit 27.)

"Returning enclosures received with your personal April 12th relative to letter addressed to Mr. Kurn signed by Limit Brown, Jim Judge and Abe Smith, Memphis.

These men are all colored brakemen on the Southern Division south of Memphis and they have reference to the proposition of our not hiring any more colored trainmen, except train porters.

We, of course, put out our information in connection with this matter very quietly, but apparently the Chairmen published the information as soon as they got back to their divisions, and a delegation of colored brakemen called on Superintendent Butler, who told them there would be no change in the method of handling those who are now employed and nothing whatever would interfere with their future employment so long as they performed their work in a satisfactory manner.

Mr. Sisson also talked to a couple of the colored firemen and they had about the same complaint, however, he told them there would be no change in the method of handling them, except that no new colored men would be employed.

(Signed) F. H. SHAFFER,
General Manager."

Mr. Packman: The next one I am going to read is our Exhibit No. 25. Is that written in longhand, Mr. King?

A. I don't know what your numbers are, what is your number?

Q. This is letter dated 4/14/1928.

A. Yes, sir, it is written in longhand, pen and ink.

Q. It bears two signatures? A. Yes, sir.

Mr. Packman: I will read the letter, date of 4/14/1928.

(Plaintiff's Exhibit 25.)

"Mr. J. E. Hutchinson. Vice President of St. L. and SF R. R.

Dear Sir:

We the undersigned Colored freight brakemen are the humble and submissive voices of the colored brakemen of the Tupelo and Birmingham Sub. Div. wish to petition your *majesty* to meet you in a conference to ascertain why and what accusations you have against us and our posterity to cast us off in old age after serving you most faithfully for over a decade and almost half our lives.

Dear Mr. Hutchinson, If it be possible for us to remedy such an accusation we are more than willing to do all there is in our power to remove the obstacles which hinder the free and embarrassed actions of those about us, thanking you in advance for any consideration you may give us, we beg to remain your servants for ever.

'LIMIT BROWN,' Gen. Chr. 17 yrs. service.
'ABE SMITH.'"

Mr. Packman: Now, I am going to read No. 26. Here is a letter under date of April 19, 1928, sent by Mr. J. E. Hutchison to John James, Box 559, Amory, Mississippi.

(Plaintiff's Exhibit 26.)

"Your letter April 15th.

You have been correctly informed that it has been decided that there will be no more employment of colored

firemen, brakemen, and switchmen. The colored men who now hold these positions will continue to hold them as long as they live or as long as they are able to perform the service properly and comply with the rules. They will not be taken out of service to make room for white employes but as the colored men drop out from natural causes they will be replaced with white men.

(Signed) J. E. HUTCHISON."

Mr. Packman: Another letter from Mr. J. E. Hutchison under date of April 19, 1928, our Exhibit No. 28. I am reading now.

(Plaintiff's Exhibit 28.)

"Limit Brown,
1295 Edith Street,
Memphis, Tenn.

I have your letter of April 14th.

It has been decided that we will not employ any more colored men as brakemen, switchmen, or firemen. All of the colored men that now hold these places will be retained in these places as long as they live or are able to do the work and comply with the rules, but as they drop out from natural causes they will be replaced with white men."

Mr. Packman: Now, letter No. 29. Would you look and see if your file shows a letter of May 17, 1928, sent to Mr. Hutchison, signed by Limit Brown, one which I just read the answer to? A. I have such a letter.

Mr. Packman: That will bear our No. 29 too. I offer it in evidence.

(Plaintiff's Exhibit 29.)

"Mr. J. E. Hutchison,
Vice-President, St. L. & SF. R. R.

Dear Sir:

After much prayerfull consideration with reference to your letter of Apr. 19, we read with much regret that de-

cision outlined in your first sentence. There are many things to be regreted in this decision, one which we would like to call your attention to.

First of all there is reasonable ground for your local officials to lose interest in us, because in the first place they feel you have: which will make it very difficult for us to stay in the services. However, We are grateful to know that we will be retained as outlined in sentence two. But: Dear Mr. Hutchison, the first and last sentences so far outweigh, sentence two, untill it leaves our hearts in pain. We know that we cannot compete with the powers that be. We would far more rather you to have deducted our salaries than to eliminated us from the employment of this great industry.

Therefore Mr. Hutchison, if it be possible and pleases you our only human salvation, We are humbly asking you, please do not close this great industrial door in the black man's face who is the least of all the inhabitants of the earth. We are thanking you in advance for any consideration you may give us because we are depending absolutely upon you for our restoration. We will be pleased with whatever you do to restore us. Because we believe as thou art a husband and father, you will do justice for us.

We beg to remain your servants as ever.

Yours Respectfully,

'LIMIT BROWN, BK.man.'"

Q. Do you have a letter dated May 22, 1928, from Mr. Hutchison to Mr. Brown? A. I do have the carbon.

Mr. Packman: That will become our Exhibit 30. We offer that in evidence. I will read it.

(Plaintiff's Exhibit 30.)

"Limit Brown,
1295 Edith Avenue,
Memphis, Tenn.

I have your letter of May 17th.

Ever since 1909 I have fought the battles of the colored employes on the Southern Division to the best of my ability. Have resisted the change that your correspondence is about as long as I could resist it but the matter was inevitable and it had to come. I will continue to take best possible care of our colored employes as long as they remain in service, which will be as long as they live provided they are not removed for just and proper cause.

(Signed) J. E. HUTCHISON."

Q. Do you have also a letter from Memphis under date of June 23, 1928 signed by Limit Brown? A. I do.

Mr. Packman: It will bear our Exhibit No. 31 and we offer it in evidence.

(Plaintiff's Exhibit 31.)

"Mr. J. E. Hutchins,
Vice-Pres. St. L. & S. F. R. R.

Dear Sir:

We do hope that we will not provoke you to anger by our continual coming.

It has become necessary that we petition your majesty for a decision on what is now confronting the colored brakeman on the Tupelo Sub. Div.

Every since the establishment of trains on the new road out of Amory, they have been manned by the trainmen of the Tupelo Sub., and until now, we, colored brakemen have been allowed to exercise our seniority on the head end of these runs, but recently these runs were abolished and new runs established. Some of our men bid on these

runs were older in service than any trainman who bid. But Mr. R. B. Butler informs us that we cannot place colored men on any run on the new road.

Mr. Hutchison, here is what this means for us, just as soon as the trainmen assure themselves that we cannot exercise authority on the new road they will give up these jobs come back to the Tupelo Sub., displace all the colored brakemen they can and let all their young men take those runs on the new road.

Then their extra men can work both ways on any position. Our men work only one way on one position. We do not feel this will be fair play.

We do hope as long as the new road is manned by the trainmen of the Tupelo Sub. we too shall be allowed to exercise our seniority on same.

Please allow us to make this proposal, if at any time in the future you will restore us to our former positions, we are organized to supply you with efficient, clean men of ability and we will work for ten per cent less than the trainmen's salary at all times, which will mean much for your company and less grief for us.

Asking your consideration.

Very truly,

'LIMIT BROWN, BK, man.'"

Q. Do you know whose pencil note that is?

A. Yes, that is Mr. Hutchison's.

Q. That seems to bear the initials of JWK.

"(Pencil Note): 'Mr. Kurn—Am sorry for these men, but nothing can do and will have to be very careful in answering their letters.'"

Q. What is the next, I can't—

A. "Please note & return as I shall have to reply. JEH, 7/17. Noted JWM."—JMK. In the fourth paragraph, second line, the way I have it, it reads "that we cannot exercise seniority"; you read it "authority." I don't know how your copy is.

Q. The copy I read is blurred and it does seem to be authority there.

A letter from Mr. Hutchison to Mr. Shaffer, dated August 7, 1929. That will be 32 as marked. You have found it? A. I have it, yes, sir.

Mr. Packman: We are offering this in evidence.

(Plaintiff's Exhibit 32.)

"I hand you herewith a letter signed by three colored brakemen, a colored switchman, and a colored fireman. The letter is self-explanatory.

I do not care to get into any correspondence in connection with this matter at all and I wish either you or Mr. Sisson would see one or more of these men as early as possible and advise them that I sent the letter to you and tell them that there is absolutely nothing we can do. The rulings of the Federal Government tied our hands and we have not been able to get away from them. We have gone a long ways to protect the interests of these men but we cannot go any further. Of course, there are no colored train or enginemen on the Pensacola Sub but I imagine when they refer to the Pensacola Division they mean the entire line south of Amory and I think the negro firemen and brakemen do catch some of the runs on the Columbus Sub, at least I see no reason why they should not.

(Signed) J. E. HUTCHISON."

Q. Do you know what that reference is there to the "rulings of the Federal Government tied our hands and we have not been able to get away from them."

A. Well, he is still talking about freight brakemen and under the orders issued by the Director General during Federal control, we were required to pay them the same wages as we did the white men, and as some of the letters you have offered in evidence show, we also put them on the same seniority roster.

Q. Didn't the same orders of the Federal Government

require you to pay the same pay to the passenger brakemen, to the head end men that you call train porters?

A. It requires us to pay the brakemen's rate to train porters who handle the duties that I testified to a few moments ago.

Q. So this just doesn't limit it to freight brakemen, does it, that the "Federal Government tied our hands" by giving equality in wages?

A. Well, that is a rather involved subject.

Mr. Packman: Well, I will pass on to the next exhibit then, a letter of August 6, 1929, signed by Jim Judge, a brakeman, addressed to Mr. J. E. Hutchinson, also signed by Limit Brown and a few others, George Crawford and Alex Smith, R. L. Williams. It will be our Exhibit 33.

(Plaintiff's Exhibit 33.)

"Dear Sir,

We, the undersigned colored employes of the Frisco road have met at St. Louis to discuss some things which seem to us unfair and to bring the same to your attention with the feeling that you will remedy them because of our full faith in your well known fairness as shown so often in the past.

We are respectfully placing before you a request for a more reasonable assignment of jobs as we shall later demonstrate and also, a request for a fair proportion of new jobs for colored men in our several crafts as new jobs may open from time to time.

We ask for a fair exercise of seniority on all divisions and particularly on the new Pensacola 'Sub' where the following situation prevails now. For instance, if in the case of a trainman, a senior colored man and two junior white men are on the board of the Tupelo 'Sub' and there is a caboose job on the Tupelo 'Sub' and any other job on the Pensacola 'Sub,' both junior white men run around the senior colored man and he is left idle. Only a serious emergency would give a colored man a turn at any time on the Pensacola division.

May we as employes, therefore, ask for this fair consideration and for the greater consideration of opening

employment from time to time to men of our race who are qualified for the positions in the several crafts?

Respectfully submitted by,"

Q. Jim Judge and the other names I read.

A letter signed by you, Mr. King, or purporting to be signed by you, under date of March 10, 1944, addressed to Mr. C. A. Rutherford, General Chairman, what initials are those? A. O. R. C.

Q. O. R. C.? A. Yes, sir.

Q. Mr. F. W. Morey.

Mr. Judge: Which one is that?

Mr. Packman: Top line where it says Rutherford, O. R. C. F. W. Morey, General Chairman, BofRT, F. H. Dierssen, General Chairman, BLE, John Stroud, General Chairman BLF&E; all of these to their respective offices in Springfield. That will bear our No. 34, and reads as follows:

(Plaintiff's Exhibit 34.)

"Gentlemen:

In our conference at Springfield March 8th, requested you gentlemen to agree to the hiring of negroes as firemen, brakemen, and switchmen on that part of the line where we have such men employed, namely, Memphis to Birmingham, inclusive, on account of the manpower shortage brought about by the war.

You indicated you would not be agreeable to this but would like for you to give the matter further consideration and advise definitely whether or not you would be agreeable to such employment practice on account of the war emergency.

Yours very truly,

(Signed) C. R. KING,
Assistant to Chief Operating Officer."

Q. Was the manpower shortage as serious as you stressed there at that time, Mr. King?

A. It was quite serious.

The Court: We will take a recess.

Mr. Packman: Yes, thank you.

Whereupon, a short recess was had, pursuant to which the following proceedings were had:

C. P. KING

resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Packman:

The Court: All right, gentlemen, proceed.

Q. (By Mr. Packman) Please refer to a letter signed by the various general chairmen of the men that you addressed your letter of March 10, 1944 to, under date of March 21, 1944, their reply. That will be our Exhibit No. 35. Do you have it there?

A. I have one signed by Mr. Dierssen and by Mr. Morey.

Q. What organization did Dierssen represent?

A. The Brotherhood of Locomotive Engineers.

Q. And Mr. Morey?

A. Brotherhood of Railroad Trainmen.

Mr. Packman: I shall read it.

(Plaintiff's Exhibit 35.)

"Dear Sir.

Your letter under file 1690-4 3019-8-1 wherein you are requesting a definite reply as to our agreeableness to the employment of Negroes as Firemen and Brakemen.

In numerous conferences on this subject, you have been advised that we were unalterably opposed to any such an arrangement. To do so would bring about an uncontrollable, chaotic condition among the employees."

Mr. Packman: Signed by those two gentlemen you read.

A letter under date of 3-12-43, signed by Mr. C. O. Carnahan, Chairman of the B. R. T., addressed to Mr. G. H. Jury, that is our Exhibit 36 and King Exhibit 43. You found it?

A. Yes, sir, I have a copy of such a letter signed by C. O. Carnahan, Local Chairman, B. of R. T.

Q. Mr. G. H. Jury, Superintendent, Eastern Division, Springfield, Missouri. Was he Superintendent of the Frisco lines? A. Yes, sir.

Mr. Packman: It reads as follows:

(Plaintiff's Exhibit 36.)

"Dear Sir:

I am in receipt of time claims and complaints from men on the eastern division due to the method of handling passenger crews, handling troop-trains at Fort Leonard Wood.

The circumstances in this case are as follows. The crews of troop trains are usually made up on an extra passenger conductor, an extra brakeman, and an extra porter. Upon their arrival at the Fort the train has to be switched to whatever extent those in authority at the Fort elect to have it switched. The same ensues as to the proper making up of the train coming out that this crew has to handle.

In the process of both of these switchings both inbound and outbound, the porter on these trains is pulling pins, throwing switches, giving signals, and in fact making a portion of the crew just as much as the conductor or the brakeman.

This is wrong, and we are asking that this porter cease being a brakeman, and be confined to the duties for which he is paid, namely a porter.

May I have your reply as soon as it is consistent for you to give it to me?

Respectfully,

(Signed) C. O. CARNAHAN,
L. C. B. R. T."

Q. Our Exhibit No. 37 will be King Exhibit 42, under date of December 1, 1944, a letter signed by Mr. C. O. Carnahan, addressed to you. do you have that?

A. Yes, I have such a letter.

Mr. Packman: That is our Exhibit 37. I shall read it.

(Plaintiff's Exhibit 37.)

"Dear Sir:

Time claim for 100 mile local rate of pay for each time a troop train was used on the Ft. Worth branch without two brakemen from the date of October 17th, 1941.

These claims in favor of the brakemen on the eastern division extra brakemen's board at Springfield. In the memorandum governing working conditions on the Ft. Worth branch of April 14th, 1941, the first clause reads as follows: 'That rates of pay and current schedule rules of engine and train service employees governing local freight service shall apply with the exception that crews so assigned may be used as many trips as necessary within the eight hours or one hundred miles without accruing an additional day.' It is the standard practice in moves of troop trains to Ft. Leonard Wood to assemble their train in the proper order after reaching this point, either if it is a loaded train into Ft. Wood the kitchen cars and baggage cars are switched out, and if it is a train of empty equipment these cars are picked up and placed in their proper position in the train. During all this switching movement the train porter performs the duties of a brakeman, throwing derails, throwing switches, giving signals, and performing all the duties of a local brakeman. In addition, when the train is completed, the porter takes the engine a distance of approximately a half mile by himself and turns it on the Y; during this time performing the movements above described.

I am asking that this claim be allowed, and that this type of handling be discontinued.

Yours truly,

(Signed) C. O. CARNAHAN,
Genl. Chrmn., BofRT
Frisco Lines."

Q. Our Exhibit No. 38 is a letter signed by L. B. Clary, under date of December 14, 1944, addressed to Mr. C. P. King. Who is Mr. L. B. Clary?

A. Superintendent, Eastern Division.

Q. Had you referred this letter of Mr. Carnahan to Mr. Clary for comment and action or action?

A. Yes, sir, or comment and advice.

Mr. Packman: I shall read it.

(Plaintiff's Exhibit 38.)

"Mr. C. P. King,

3014-17 Dec. 9th.

Train porters are not doing anything now that they haven't done all these past years. There has been no change so far as I can find out in their duties since chair car porters were put on some of the trains. As you know, chair car porters were put on some of the heavier trains to look after the passengers' needs, assist in loading and unloading passengers, keep the cars clean, where we felt that this couldn't be done by one porter.

My letter April 18th to Mr. Carnahan is the only handling that has been given by this office with Mr. Carnahan, and the only other handling that I locate is your letter April 19th, 1943, about Mr. Morey's request for head brakemen on Nos. 1 and 2 between Springfield and Dennison.

(Signed) L. B. CLARY."

Q. Were there train porters on those trains, Nos. 1 and 2, between Springfield and Dennison, instead of white men, designated as brakemen?

A. Between Springfield and St. Louis there were no train porters, had brakemen. At that time there were train porters, I believe, west of Springfield. Later on we made a change there and put head brakemen on west of Springfield. I don't recall just what the date was.

Q. Were they doing almost as much work as the train porters when you put on these white brakemen on the head end? A. Who?

Q. The white brakemen? The question was, were they doing almost as much as train porters were doing when you substituted the white brakemen for the train porters?

A. West of Springfield?

Q. East of Springfield.

A. East of Springfield, we have had head brakemen on there for a good many years. I don't recall distinctly right now, but at least at the time those trains were put on or very shortly thereafter. We used head brakemen. If we used train porters at all on those trains it was only for a very short time.

Q. Does the head end brakeman, a white man, load passengers where you don't have a train porter?

A. Yes, they load passengers.

Q. Do you know of occasions where they clean cars?

A. No, they don't clean cars in the sense of sweeping out or anything of that kind.

Q. Do they pick up bottles?

A. They may pick up a pop bottle or something of that sort.

Q. Do they handle pillows between any points with the permission of the railroad? A. Yes, sir.

Q. What is the situation, how is that handled, are they paid extra for it? A. Yes, sir.

Q. Does the train porter, does he receive extra pay for handling the pillows? A. Yes, sir.

Q. That is not covered by any contracts with any so-called train porters?

A. It is in the contract of the train porters that they are allowed an additional sum where required to handle pillows except for instances where they just handle two or three for use in emergencies.

Q. Is that in the contract with the B. of R. T., that when a brakeman handles [money] that he should get extra money for pillow handling?

A. We had an exchange of letters and agreed to pay them an extra amount where they handle pillows for the benefit of coach passengers.

Q. Would you kindly locate those letters for us, make a note of it and we will produce them tomorrow, it will be timely enough. Mr. King, do you have with you a strike ballot under date of December 21, 1943, which was dis-

tributed by the B. of R. T. That is No. 40, the combined number of exhibits prepared by Mr. Baumann.

A. I have a copy of it, yes, sir.

Mr. Packman: Kindly give that one of our exhibit numbers in sequence. May we have that copy marked, or else I will take a copy of it here. Let's assume that I will produce a copy. Would you kindly read that exhibit no. 39?

(Plaintiff's Exhibit 39.)

A. "Official Ballot, December 21, 1945. To all members of the Brotherhood of Railroad Trainmen and others employed in train and yard service by the St. Louis San Francisco Railway Company and the St. Louis, San Francisco & Texas Railway Co.

Dears Sirs and Brothers: The General Committee representing the Brotherhood of Railroad Trainmen has earnestly endeavored for a considerable length of time to adjust certain disputes with officials of the Company, and on a number of occasions was assisted by Grand Lodge officer, without reaching an agreement.

Notice was served on the management November 27, 1944, for abrogation of the agreement which became effective April 16, 1939. Conferences were had on the several matters without reaching an agreement. Being unable to [affect] a settlement action was taken by the General Committee of the Brotherhood of Railroad Trainmen and approved by the Chief Executive to submit to you for your consideration and action pursuant to the governing laws of the organization, the following cases which are predicated on violation of rules, and settlements of the N. R. A. B. First Division. Awards and settlements of the management and the refusal of the management to cancel the agreement effective April 16, 1939."

Q. Would you skip Cases 1 and 2 and read Case No. 3?

A. "Case No. 3. Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co. and claim that additional brakemen covered by and paid

under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained."

Q. Would you kindly skip over to Case No. 12 then?

A. "Case No. 12. Claim of all freight crews on the St. Louis San Francisco Railway Company and St. Louis San Francisco and Texas Railway Co. for one day at freight rates who were available and not used to man troop trains and trains of empty equipment going to and/or returning from troop movements for March 27, 1941 and all subsequent dates, in accordance with letter of instructions dated August 15, 1918 over the signature of Mr. J. M. Kurn, General Manager, which has not been cancelled. Respectfully submitted, C. O. Carnahan, General Chairman, B. of R. T. Approved: J. A. Rash, Deputy President, B. of R. T."

Q. In reference to Case No. 12 was it the contention of Mr. Carnahan that the train porters were doing the work which freight brakemen were available to perform, white men? A. That was not primarily the issue in that case.

Q. Was that an incident of the issue, though?

A. No. The real issue in that Case No. 12 was that some railroads used freight crews to handle troop trains and they contended that a letter written by Mr. Kurn, August 15, 1918, required that we use freight crews on troop trains rather than passenger crews.

Q. Now, if there had been a freight crew, would a freight brakeman have been doing the head end work exactly like the train porter?

A. Well, he would have been doing the head end work, I wouldn't swear that it was exactly like the train porter.

Q. There is nothing on a troop train, though, which can be called troop porter work in the sense of sweeping, or incidental stuff like that, is there?

A. Well, I should think that men, whether they are in uniform or out of uniform, would litter the cars the same. I can't testify—

Q. (Interrupting) Would you expect them to do anything besides strictly breaking work when a train porter was assigned to a troop train?

A. Yes, they were assigned as train porters, there is no differential.

Q. I get your point, then, the freight brakeman would not have kept the troop car clean, he would not have done as much as a train porter if he had been assigned?

A. A freight brakeman wouldn't have been expected to clean the cars.

Q. Would a freight brakeman have received more money for—

A. (Interrupting) If you use a freight brakeman on a train, he gets freight brakeman pay which is higher than a train porter.

Q. After the injunction was issued by this Court, I believe under date of March 30, did your company take train porters off of troop train movements?

A. Under the agreement with the Brotherhood of Railroad Trainmen, we agreed to use freight brakemen on troop trains rather than passenger crews.

Q. And the scope of the pleadings did not protect the railroad against maintaining porters on troop trains?

A. I did not understand that.

Q. Isn't it a fact that after the injunction came out you saw that its scope did not protect the company in case it didn't replace train porters?

A. Well. I will put it this way, Mr. Packman. We did not consider that the injnction interfered with carrying out the agreement with the Brotherhood of Railroad Trainmen that we would use crews of freight men on troop trains instead of passenger crews.

Q. Do you have the strike ballot that was submitted to the men in connection with the notice that you were reading from, outlining the cases?

A. Yes, I have a copy of a letter, December 21, 1945, that was put out, as I understand it, along with the strike ballot.

Q. We will have that considered our Exhibit No. 40. Do you have it available to read, Mr. King? A. Yes, sir.

Q. Would you kindly read it?

(Plaintiff's Exhibit 40.)

A. "Springfield, Missouri, December 21, 1945. To members and others employes in train and yard service on

the St. Louis San Francisco Railway Company and the St. Louis San Francisco and Texas Railway Company. Dear Sirs and Brothers:"

Q. Pardon me. When I asked you to read that I didn't realize how long it was. Suppose we just show that to the court and get his impressions on it. The ballot on it is Page 3 of the form you are reading? A. Yes, sir.

(2 letters, handed to the reporter, were marked for identification "Plaintiff's Exhibits 41 and 42, 10/14/46, OP", respectively.)

Q. (By Mr. Packman) Go ahead, Mr. King. Did you subsequently receive any advice from the B. of R. T. that that strike would be called pursuant to the strike vote? I direct your attention to a letter of January 3, 1946, which we will call Plaintiff's Exhibit 41.

A. Yes, I received a letter on January 5 signed by Mr. C. O. Carnahan, approved by Mr. J. A. Rash, dated January 3rd, 1946, notifying me that a strike in yard and road service employes under the jurisdiction of the Brotherhood of Railroad Trainmen would be effective 6 p. m., Sunday, January 6, 1946.

Q. Did you consider that notification seriously?

A. Yes, sir.

Q. What did you, as an official of the railroad and other officials seek to do to prevent a tieup of the railroad?

A. We immediately contacted the National Mediation Board in Washington and also took whatever other steps we thought we could to try to remove the threat of an actual strike.

Q. Did you prevail upon the Brotherhood through one means or another to defer the time for the commencement of the tieup which was threatened?

A. No. The strike did not take place on the day set because in handling with the National Mediation Board under the Railway Labor Act, the President issued an Executive Order January 5, 1946, creating an emergency board to investigate the disputes and make a report.

Q. Did the B. of R. T. indicate that they would follow the directions of the emergency board or did they still hold strike threat over the heads of the Frisco system?

A. Well, they indicated that they would not follow the recommendations of the board and the strike as originally set was not cancelled but merely postponed.

Q. Now, did anyone get in touch with Mr. Whitney, who I understand was President of the B. of R. T., to get this postponed?

A. Subsequent to the emergency board report, yes. Mr. Worman, our Chief Operating Officer, had a telephone conversation with Mr. A. F. Whitney, President of the Brotherhood of Railroad Trainmen.

Q. What was the decision as to the time for the walkout?

A. Well, Mr. Whitney advised Mr. Worman that as to one of the cases which had to do with cancellation of an agreement dealing with roadmen performing the service in yards, that that agreement would have to be cancelled, and that if we would do that, the strike date would be postponed until we had an opportunity to meet with the general committee of the Brotherhood of Railroad Trainmen on our railroad and endeavor to work out a settlement of the remaining disputes.

Q. Did you have any conversation or communication from Mr. Carnahan in which he fixed the postponment of this strike? A. Yes, I did.

Q. The strike threat? A. I did.

Q. Do you remember the substance of it?

[Q.] Well, the substance of it was that in the event that we did not settle the disputes and the strike date was reset that they would not set a date for leaving the service until after they had given us a week's notice.

Q. Now, prior to that time and during this interval, had your company concluded that it would dispense with the services of train porters who had been enjoying the benefits of their job opportunities on various runs of the Frisco system?

A. I am not sure that I understand between what periods you are referring to.

Q. I mean up to, shall we say the appointment of the President's emergency board, had your company concluded under free will it was going to dispense with train porters as not being necessary or useful? A. No.

Q. After the President's board was in session and before it rendered its ruling, had you come to a ruling voluntarily of your own free will of the managerial policy that train porters were [deleterous]' or unnecessary for your service? A. No.

Q. Did you engage in further conferences with other executives of the Frisco Railway in order to endeavor to settle a controversy with the B. of R. T.?

A. Yes, when the question of a strike came up, all of our operating and executive officers who were concerned with the operation of the property were consulted.

Q. Did Mr. Carnahan indicate to you prior to your last set of conferences which culminated in the memorandum of March 7, 1946, that he wanted to withdraw his promise to give the railroad seven days' notice before the strike would be put into motion?

A. Yes, he asked me, I think it was in a telephone conversation if I would release him from his promise to give us seven days' notice. I told him I couldn't consistently do so.

Q. Did he indicate why he wanted to be relieved of that week's notice to your company?

A. No, I do not recall that he did.

Q. Did you hold conferences for some time prior to March 7, 1946 at Springfield, Missouri, together with Mr. Carnahan? A. Yes.

Q. And members of the union, the B. of R. T.?

A. Yes, we had conferences.

Q. Was anyone notified who was a train porter that he should be present, participate in these conferences?

A. Not by myself.

Q. Was there anything in the discussion on the part of Carnahan showing any consideration for any members of the B. of R. T. that they were concerned about any of the train porters losing their jobs or income?

A. His position was that train porters shouldn't be permitted to perform so-called brakemen's duties such as throwing switches, setting out and picking up cars, flagging, matters of that kind. His position, with reference to straight porter work, cleaning up the cars and so on; was that he had nothing to do with that, we could keep the porters on to do that kind of work.

Q. Did you contend in your discussions that these train porters were not doing anything different than they had been doing since the memory of the officials and even beyond that, according to the records of the company?

A. Yes, sir.

Q. Did that make any difference to Mr. Carnahan?

A. Not so far as I know.

Q. Now, during the time when you were conferring in Springfield, Missouri with other executives, were you under the impression that unless the company signed up and acquiesced in meeting the demands of the B. of R. T. that a strike was imminent, that just seven days of deferment—

A. Yes, it was our definite conclusion that unless we reached some settlement of the issues on the strike ballot that we would have a strike.

Q. Did you dispose of Case No. 3? A. Yes.

Q. Was that settled with other cases on March 7, 1946?

A. It was.

Q. How did you formulate the memorandum of settlement or disposition?

A. You mean how does it read?

Q. No, what form did you put it in, was it a contract?

A. Letter agreement.

Q. Was Mr. E. E. Oster, Vice-President of the Brotherhood of Railroad Trainmen, present at these conferences?

A. He was.

Q. And he was collaborating with Mr. Carnahan and trying to get these cases disposed of?

A. He was collaborating with Mr. Carnahan and the full general committee of the Brotherhood of Railroad Trainmen on the Frisco system who were present.

Q. I show you Plaintiff's Exhibit No. 42 and ask if that is a true copy of the memorandum which was entered into on March 7, 1946, with the B. of R. T. A. It is.

Q. Would you please read Case No. 3 from that, if you can see it, or else I will read it.

A. "Case No. 3—Effective April 1, 1946, the practice of train porters performing work generally recognized as brakeman's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2, 1945, where claims have been submitted to be paid."

Q. Is there something else there? A. That is all of 3.

Q. At the time this was signed by you for the Frisco system, was that because of the impossibility of avoiding the strike unless you acquiesced in this particular disposition?

A. Well—

Q. (Interrupting) In reference to Case No. 3?

A. As I have stated before, No. 3 was one of a list of other cases and it is our definite conclusion unless we settle these cases we would have a strike.

Q. Did you endeavor to try to dispose of some and hold out on others as part of your negotiations? A. Yes.

Q. Had you endeavored to defer the settlement of Case No. 3 in a manner which finally had to be agreed to?

A. In the handling of this case, prior to the emergency board report, in fact, prior to the strike ballot, we had discussed with respective representatives of the Brotherhood of Railroad Trainmen the referral of the dispute to the National Railroad Adjustment Board. That was the recommendation of the President's emergency board.

Q. That is this case, this Case No. 3?

A. Yes, sir. They were not agreeable to referring it to the National Railroad Adjustment Board which was what we proposed after the President's emergency board had made its report, but insisted on disposition of it at that time.

Q. In other words, you knew that this Case No. 3 was on the must list, unless you disposed of it as you saw fit there would be a strike?

A. Unless we disposed of it by some kind of an agreement, yes.

Q. Pursuant to the stipulation entered into on March 7, 1946, what did your company do?

A. We immediately started plans to put head brakemen on a substantial number of our passenger trains where head brakemen had not previously been used.

Q. Was that in lieu of the train porters who were to be replaced? A. Yes.

Q. And they were to perform the duties and functions that the train porters theretofore had been handling?

A. With the exception of—

Q. (Interrupting) Not as much?

A. (Continuing) —some cleaning up of cars and things of that nature.

Q. Did you cause word to go forth to the various divisions to post notices that bids would be entertained for brakemen to apply for certain runs for head end work?

A. Yes.

Q. Who would be eligible to apply for these openings?

A. Men holding seniority as brakemen.

Q. Any Negro available for those openings on a passenger run, as a head end brakeman on those seniority lists?

A. Well, the reason I was hesitating, we have some Negroes on the brakemen seniority roster east of the Mississippi River.

Q. Men who had been in the employ of the company prior to 1928? A. That is correct.

Q. On freight service? A. In freight service.

Q. None were called brakemen who were in passenger service? A. No.

Q. In other words, the job opportunity would be confined to just the white people?

A. Yes, except right at the moment I am not right sure about these Negroes that were on the brakemen's roster east of the Mississippi River.

Q. Are there any Negroes on the brakemen's roster west of the Mississippi River? A. No, sir.

Q. So that west of the Mississippi River, Springfield and out of St. Louis, meant that the vacancies created perforce of necessity by the stipulation in Case No. 3 would be filled by white men?

A. These vacancies that were advertised would be filled by white men west of the Mississippi River.

Q. How much would they receive?

A. They would receive the brakemen's rate of pay as provided by agreement between the company and the B. of R. T.

Q. That is much more than a train porter had been receiving? A. It is more than a train porter was receiving.

Q. During all these negotiations with Mr. Carnahan or Mr. Oster of the B. of R. T., had they said they would be content with permitting train porters to remain on and do the head end work if you would elevate their pay to that of other men doing the same functions? A. No, sir.

Q. Did they say they would be content if you would

have them confine their services to the same things that head end brakemen did and not permit them to do extra services for less money, were they concerned about that?

A. No, they made no such proposition.

Q. Did they show any concern at all about the problems of the train porter in case they were resultful in getting white men to take their jobs at higher pay for doing less work?

A. Well, their position was that they had no objection to them remaining in service with their duties confined to cleaning up the cars, assisting passengers on and off, and assisting in loading passengers on and off the trains.

Q. Make them hewers of wood and haulers of water, correct?

A. Their position was that that was something between the company and train porters, that their request was that they be relieved of these duties which they considered brakemen's work.

Q. How many men were on the rosters of the Frisco who were called train porters or extra men, that is, who were on runs or on reserve runs?

A. I have a memorandum which I made in the files March 29, 1946. At that time we had a total of 68 regular assigned positions on the Frisco proper, 1 on the Texas lines. There were 34 extra train porters, which figure did not include 8 who were in military service.

Q. Do you know how many Negro brak men were in the employ of the company who have the rating of a brakeman before 1928? A. No, sir.

Q. On March 14, 1928?

A. I cannot recall from memory and I have no figures here to show.

Q. Are you aware there has been a considerable falling off in the number of Negroes on the roster who are called brakemen of the Frisco since 1928 as a result of the 1928 agreement, which the B. of R. T. insisted on? A. Yes.

Q. How many train porters actually received notices that they should turn in their switch keys, fusees and all their train equipment pursuant to the disposition of Case No. 3?

A. I do not know.

Q. All you know is how many might have been?

A. That is correct.

Q. How much notice did the train porters actually receive as individuals? What was the earliest date of the posting of notices to the train porters that their jobs were to end, that they should turn in their equipment?

A. I can't tell you. I didn't handle the detail of that. That was handled by the superintendents and other division officers.

Q. But you were aware that whenever a train porter was to be taken off, a white brakeman was intended to replace that man on that run?

A. Well, generally, where we took off a train porter, we expected to put a white brakeman, head brakeman on the train.

Q. And that is because the functions that that train porter performed fell within the craft and items which are commonly called brakemen's tasks?

A. It is because some of the work which the train porters had been doing was contended to be brakemen's work by the B. of R. T., and that work on the trains we expected to put head brakemen on remained to be done, and to expedite the train movements, and so on, and we expected to put head brakemen on there.

Q. What percentage of the actual time devoted, or of the activities and time devoted, by the so-called train porter was devoted to the task for which a white brakeman would take his place?

A. I never checked the duties personally and I wouldn't consider myself competent to testify.

Q. Were you aware at the time that the public was interested in having cleaner cars rather than dirtier cars on various railroad lines?

A. Oh, generally, I think anyone would agree that the public would rather have a clean car than a dirty car.

Q. So when you would replace a train porter in addition to being a head end man, the public would not be served unless you also put on a chair car porter, would it, in keeping a car clean?

A. I wouldn't say that. There has been a considerable change in the railroads in the last several years, especially with reference to air conditioning. The cars do not get dirty as rapidly as they did. There has also been some change in the habits of the traveling public that causes the cars to not get dirty as much as they once did.

Q. They still get dirty? A. They still get littered up.

Q. Do passengers still carry baggage on trains where you wouldn't have train porters? A. Yes.

Q. Would the head end brakeman be expected to assist that passenger in hoisting the bags up on top for old women and children and such and others who might not have the strength to go with the weight of their baggage?

A. Well, it was generally conceded, without any actual agreement to that fact that if a brakeman saw some old lady there that needed assistance that he would do it, as he might do a humanitarian act, whether he was required by rule to do it or not.

Q. Would that make him a porter if he did that?

A. I wouldn't say so.

Q. In other words, it is the dominant thing that the man does which creates the craft, isn't that so?

A. Sometimes; sometimes it is the fact that he does one particular function.

Q. Is it true that the importance of a head end brakeman has increased because of the speed of trains and their faster schedules, so that in figuring your operating necessities you know you need a man to perform the head end work more than a cleaning end?

A. Well, that might be a matter of opinion as to the speed of the trains and so on and so forth. I wouldn't admit that the speed of the train has anything particular to do with the duties performed.

Q. Well, shall we say the deterioration of some of the equipment, of the road beds?

A. I wouldn't admit to the deterioration of equipment.

Q. If I understand you correctly, the importance of the clean-up work on cars has declined, correct?

A. Yes—well, now, just a minute. You said "importance," what I—

Q. (Interrupting) I mean to the public.

A. What I had reference to was to volume rather than importance.

Q. Now, if the volume or task formerly expected of train porters in the cleaning department would be reduced, there is nothing which would militate against train porters still doing the major responsibility of head end men if they were permitted to remain on those runs? Is there any

lack of ability on their part which would prevent them carrying out less work where in the past they had to do more work?

A. If you mean by that, were the train porters competent to do the work they had been doing—

Q. (Interrupting) Yes.

A. (Continuing) —and are doing, I would say that we consider them competent to perform the duties that are assigned to them.

Q. And would their ability to carry on be reduced any if they were not told to sweep a car?

A. If they were not told to sweep a car?

Q. Yes, in other words, if they were permitted to go about a day's work like a white man and draw more pay for doing less work, would their efficiency as head end brakemen be reduced?

A. I wouldn't think so.

Mr. Packman: That is all. May we ask your indulgence now?

The Court: Yes, I think we will recess now. I will adjourn the court until nine-thirty, but you gentlemen can return at ten, because I have a lot of little matters to take up. As far as this case is concerned, we will adjourn until ten o'clock, but the court will adjourn until nine-thirty tomorrow morning.

Whereupon, the Court stood at recess until Tuesday, October 15, 1946, at nine-thirty o'clock a. m.

Morning Session, Tuesday, October 15, 1946.

Pursuant to adjournment as aforesaid, the Court met present and presiding as before, and the trial continued as follows:

C. P. KING

resumed the stand and testified further as follows:

Direct Examination (Continued).

By Mr. Packman:

Q. Mr. King, did you endeavor to locate a file, 1625-15, which contains a letter of August 9, 1919, that is referred

to by Mr. E. E. McGuire in his letter to Mr. Kurn, dated September 26, 1919?

A. Yes, we made very considerable search of our files that were immediately available and were not able to locate them.

Q. During the recess yesterday, I was accorded a copy of Supplement No. 12 to General Order No. 27, which I had requested you to produce. I will have that marked as an exhibit.

(A document, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 43, 10/15/46, OP".)

Q. I show you Plaintiff's Exhibit 43 and ask you if that is a copy of the order that was furnished me by Mr. Baumann? A. Yes, sir, that is a copy.

Mr. Packman: We offer it in evidence. It reads as follows:

(Plaintiff's Exhibit 43.)

"United States Railroad Administration

Washington, D. C., December 2, 1918

Supplement No. 12 to General Order No. 27.

To carry out the intent of Article VI, of General Order No. 27, and retroactive to June 1, 1918, it is ordered:

1. Employees in a passenger train crew, except conductor, collector and baggagemaster, qualified and regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly:

(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

(b) Use hand and lamp signals for the protection and movement of trains.

(c) Open and close switches.

(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

(e) Compare watches when required by rule.

2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

3. This order shall not curtail the duties of employees heretofore classed as 'train porters.'

4. This order shall not infringe upon the seniority rights of white trainmen.

W. G. McADOO,
Director General of Railroads."

Mr. Packman: Mr. King, do you have in your file a copy of a letter dated March 16, 1921, written to J. M. Kurn by General Manager Hutchinson?

A. I am not able to say definitely right now whether we do or not. Probably we have.

(Two documents, handed to the reporter, were marked for identification as "Plaintiff's Exhibits 44 and 45, 10/15/46, OP", respectively.)

Q. (By Mr. Packman) I show you a document which we have had identified as Plaintiff's Exhibit 45—I have numbered another one 44, gentlemen. I direct your attention to what appears to be a reprint in the decision of the War Labor Board, No. 2181, rendered March 5, 192[illegible], Docket 773, changed to 8553, wherein that communication is set out in quotation marks. Would you look at that and see if it refreshes your memory as to the existence of such a letter? We may assume for the present part of the hearing that this is valid, subject to [varification] by your counsel and your staff later. There is a reference in this decision to the carriers' position, in connection with a protest against a reduction in wages effective February 1, 1921, applying to all colored trainmen working on the head end of passenger trains. The reduction in wages is alleged to have been put into effect without conferences or agreement with the employees involved. Do you have in your file a statement which was referred to here in the War Labor Board decision, Railway Labor Board decision?

A. We should have that, yes, sir.

Mr. Packman: May we also assume that the court, or whoever copied this, was accurate in its statement?

Mr. Baumann: Subject to [varification] by our files. I assume it is all right for the present.

Mr. Packman: Very well.

Q. Would your files contain the statement in connection with the submission of the employees' position?

A. Yes, it would, in the decision that was rendered by the Board.

Q. I assume that your company was represented at the hearing and knew what was being presented as furnished copies? A. Undoubtedly so.

Mr. Packman: It is our desire to offer in evidence this Plaintiff's Exhibit No. 45, which contains the position of the employees, the company's position, and the opinion of the Board, and the letter to which I have referred. May I read it? I have already read the question. It is captioned:

(Plaintiff's Exhibit 45.)

"United States Railroad Labor Board
Chicago, Ill., Mar. 5, 1924

Decision No. 2181

More than 100 unorganized employes

v.

St. Louis-San Francisco Railway Company

Question—Protest against a reduction in wages effective February 1, 1921, applying to all colored trainmen working on the head end of passenger trains. The reduction in wages is alleged to have been put into effect without conference or agreement with the employes involved.

Statement—The submission contained the following:

'Employees' Position—Would like to call your attention to the fact that on or about January 21, 1921, the officials of the St. Louis San Francisco Railway Company—namely, the superintendents and assistant superintendents—notified

all colored trainmen that on February 1 their salaries would be cut to one hundred twenty dollars ($120) a month on a 240-hour basis, overtime after 240 hours. This rate of pay was put in effect February 1, 1921, and applied to all colored trainmen working on head end of passenger trains.

'The colored trainmen requested that the notification be in writing or in bulletin form, the usual manner in which all other instructions are received. This the carrier refused to do.

'On March 13, 1921, a committee of five colored trainmen called at the office of the general manager, J. E. Hutchison, Springfield, Mo., and discussed with him the reduction in salary and several rules on working conditions, but received no consideration.

'On July 2, 1921, a second committee of nine colored trainmen called at the general manager's office at Springfield, and held conference with Mr. Hutchison in regard to the reduction in salary which was put in effect February 1, 1921, without conference or agreement with the colored trainmen. Mr. Hutchison declined to give the committee any consideration in regard to this matter, but presented the committee with an agreement to sign for one hundred twenty dollars ($120) a month flat 240 hours a month, fifty cents (50¢) an hour overtime after 240 hours. The committee refused to sign this agreement and asked Mr. Hutchison if he would jointly submit the matter to the Railroad Labor Board for a decision or settlement of the matter. This he frankly refused to do.

'The committee then notified Mr. Hutchison that the case would be submitted to the Board for settlement in accordance with the Transportation Act, 1920, and Decisions No. 2 (I, R. L. B., 13) and No. 119 (II, R. L. B., 87).

'In 1918 when the Government took charge of the railroads, the colored trainmen sent a committee before the United States Railroad Administration and established the fact that colored trainmen working on the head end of passenger trains were performing the duties of brakemen and the railroad administration issued Article VI of General Order No. 27 which reads in part as follows:

'Colored men employed as firemen, trainmen, and switchmen shall be paid the same rate as are paid white men in the same capacities.'

'Since that time and until February 1, 1921, we were paid on a mileage basis the same rate of pay as other brakemen.

'Prior to February 1, 1921, we were paid at the rate of three dollars and thirty three cents ($3.33) per hundred miles which rate was in accordance with the decision of the Railroad Labor Board issued in July, 1920.

'Therefore we appeal to the Board for adjustment in this matter considering the fact that we were illegally cut in salary according to the Board's decision of April 18, 1921, that no class of labor should be cut until July 1, 1921.

'Carrier's position—Prior to Federal control we had on practically all of our passenger trains a crew consisting of a conductor and brakeman and the colored porter.

'On many of these trains under certain conditions the porter was permitted, and possibly in some instances required, to do such work as opening and closing switches, coupling and uncoupling cars, giving signals, etc., in connection with train or car movements, and to perform a limited amount of such service as is usually performed by the conductor and brakeman.

'When the instructions from the United States Railroad Administration were received placing these men on a parity with the brakemen, drawing the same rates of any and the same working conditions, that automatically converted the majority of our train porters into brakemen, and they drew the same rate of pay and had practically the same working conditions as the white brakemen. This action was taken without the consent of the St. Louis-San Francisco Railway Company, and in our opinion was wholly unnecessary and unwarranted.

'Some time after the termination of Federal control—namely, on February 1, 1921—we reverted to our former condition, abolished these positions as colored brakemen, and reestablished our position of train porter carrying a rate of pay of one hundred twenty dollars ($120) a month,

based on an 8 hour day, 240 hours per month, with arrangements for overtime pay after 240 hours per month.

'We considered this eminently fair, as the rate of pay itself was fully double the rate we had paid these men for exactly the same service prior to Federal control, and we also placed them on an overtime basis which they did not enjoy prior to Federal control. This arrangement, as stated, was put in effect on February 1, 1921, and there was no protest of any kind made by the men until on or about July 2, 1921.

'In the porters' presentation to the Board they state that on March 13, 1921, a committee of five colored trainmen called at the general manager's office at Springfield, and discussed with him the reduction in salary and several other rules on working conditions, but received no consideration.

'The facts are that on or about March 13, 1921, five of our colored train porters called at the general manager's office without announcement or any prearranged date or notice as to what they desired to discuss. They were first asked who they were and who they represented. Their reply was that they were five porters in our regular employ and that they represented the train porters on the St. Louis-San Francisco Railway.

'They were then asked by what authority they represented train porters and they advised that they had constituted themselves a committee to call and talk over the wages and working conditions of train porters. They were advised that we were always willing to discuss any matter with any employe of this carrier.

'They requested that an increase be granted above one hundred twenty dollars ($120) per month established February 1, 1921. Their attention was called to the fact that they were receiving compensation equal to increase granted other employees and in some instances more than double what they received prior to Federal control.

'They advised that they realized that porters must accept a less rate of pay than brakemen if they expect to retain positions as porters. They did not intimate that they con-

sidered the reduction unlawful or that they proposed to protest it in any manner.

'Several items as to working conditions were discussed, among which was lay-over time at one particular terminal and care of equipment such as lamps, markers, flagging, supplies, etc. Every arrangement possible was made to correct conditions regarding lay-over time at terminals, and when they left the office they were apparently satisfied.

'To substantiate the fact such conference was held, there is quoted below a letter written to J. M. Kurn by General Manager Hutchison, dated March 16, 1921, giving result of such conference:

'Five of our train porters called on me yesterday representing themselves to be a committee of train porters, desiring to take up the question of pay and working conditions.

'They stated first that they desired to have us consult with them in connection with employment of porters to the end that no men who were not reliable be employed. They stated that we had in the past employed men who were crooks, bootleggers, and dishonest in a number of ways; that these things were well known to them; and that the men would not have been employed had they been consulted.

'I told them we could not delegate the employment of our men to anybody; that we would continue to employ them in the future as we had in the past; that if they knew of any one whom we employed being of an immoral or dishonest character it was their duty as loyal employes to go to their assistant superintendent and acquaint him with the facts. This they promised to do.

'They next asked that we arrange, as far as possible, to cut their lay-over at points away from their home terminal as short a time as possible. I told them that this was a reasonable request of our employes and would be given very careful consideration.

'Then they asked that strict seniority be applied to them in placing them on runs. I told them that they well knew that we could not do this, and that it was not for the best

interests of the porters themselves that we undertake to do this absolutely, but I did tell them we would give very close attention to it and would favor the older porters with the better runs just as far as we could.

'They were very frank in saying that they fully recognized the difficulties in the way of placing them on the runs according to their age and that all they would ask would be that the matter be given consideration and that we do the best we could.

'They then asked about the question of their pay, stating that they thought the cut in their pay was unreasonable and was greater than we would probably think of cutting any other class of employes. I told them that they were quite right from that viewpoint alone, but told them also that they knew just as well as I did that the increases they received were out of reason, and that no one could possibly justify the increase which was given the train porters. I told them that the only doubt I had in the matter was whether or not we had cut them sufficiently; that I was rather of the opinion that their pay should have been made one hundred dollars ($100) a month instead of one hundred twenty dollars ($120).

'After talking to them along that line they stated they would withdraw any request for a consideration of their rate of pay; that they would state for all the porters on the line that they were satisfied with their present rates of pay; and that if we could work out a better condition as to placing them on their runs and cutting down their time away from home terminal, both of which would save them expense, they would be entirely satisfied.

'I discussed matters generally with them, told them the thing that they should do was to do their work, and do it well, do everything they were called upon to do whether they thought it was in their line of duty or not, and to make themselves as useful and valuable as they could, as they owed this to themselves in order to insure their retaining the places they now have.

'They accepted what I had to say to them exceptionally well, and left the office with the assurance that we would hear nothing further from them.

'I shall proceed to do the very best I can on the two points of cutting down their time away from home terminal, and placing them on runs with as much regard to their seniority as we reasonably can.'

'Nothing further was heard from them until on or about July 2 when some nine or ten of the colored porters again called at the office of the general manager, as was done in former instances, without any previous advice as to what they wished to discuss.

'They were shown into the office and one of them acting as spokesman stated that they had called to protest the decrease in wages which was made effective February 1. They made some reference to portions of Decision No. 119 and the Transportation Act, 1920, and requested that their wages be adjusted to the rates in effect prior to February 1, 1921, that they be allowed back pay to date, and that the rates in effect prior to February 1 be continued until such time as they were changed by negotiations.

'They were advised that the change in rates of pay effective February 1, 1921, was for the reason we had recreated the position of train porter and that in doing so we had established what we considered an absolutely fair rate of pay; that the men had worked for five months under the reduced rate without protest, and we could not consider their requests, and further that a committee of five representing the porters had conferred with us during March, 1921, and agreed to abide by the action taken.

'When questioned as to their authority to represent the train porters, they admitted that they had constituted themselves as a committee without consulting the train porters of the road, and that they had not been properly elected to so represent them.

'There is attached for the information of the Board, copy of agreement between the management and its train porters, which is now in effect, having been signed individually by a majority of the train porters.

'It is our contention that we were within our rights in recreating positions of train porters and paying them a reasonable rate of pay; that in doing so we were within

the law and orders of the Railroad Labor Board; and that our act should be sustained.'

Opinion—The employees involved in this dispute are colored men and on February 1, 1921, the effective date of the wage reduction complained of, they were unorganized. Up to the time of the hearing of this case they were still unorganized and their complaint herein is submitted by 100 (or more) unorganized employees, in accordance with a provision of the Transportation Act, 1920.

At various times, however, certain committees and individuals claimed the right to represent these colored employees in conferences with the carrier relative to the matters here in controversy. The authority of these representatives was usually, if not always, questioned by the employees themselves or some portion of them.

The carrier in September, 1921, negotiated an agreement, effective February 11, 1921, with Sandy Eslinger, who claimed to act as general chairman. This agreement covered the disputed question of wages and confirmed the carrier's reduction. Subsequently 112 of the 145 employees concerned signed a written ratification of this agreement. Later on, they repudiated it and stated that they had signed it "through fear of violence." The carrier refutes the idea that any such threats of violence were made on its behalf.

It thus appears that these employees acting as unorganized employees ratified the action of the carrier in writing, just as they appear before the Board as unorganized employees and in writing repudiate their action.

In this connection, it must be noted that these colored employees, even though they be brakemen as they claim, are not eligible to membership in the Brotherhood of Railroad Trainmen, the brakemen's organization. Having no organization of their own on this carrier's property, they seem to have adopted the method of signing individually written authorizations, agreements, etc. The carrier could not well avoid dealing with them in accordance with the only method which they themselves had offered to practice.

Under these conditions, having entered into an agreement with the carrier by the method of their own choice and practice, although an irregular and unsatisfactory one, it would not be conducive to good faith and the furthering of justice to sanction by a decision in this case their repudiation of said agreement.

Decision—The Railroad Labor Board therefore decides that—

(a) The request of the employees is denied in so far as it affects rates of pay prior to this date.

(b) The Board shall hold this case on its calendar, treating it as an application for a reclassification and for the rates of pay of brakemen; the Board will investigate the nature of the duties performed by these employees with a view to determining whether they are brakemen and entitled to be paid accordingly.

By order of

UNITED STATES RAILROAD LABOR BOARD,

(Signed) BEN W. HOOPER,
Chairman.

Dissenting Opinion.

For reasons hereinafter set forth the undersigned dissents from the decision of the majority.

This dispute came to the Board through a representative selected by 135 of approximately 145 colored brakemen in the service of the carrier. The personal signatures of the 135 employees authorizing the representative to submit the case were filed with the Board.

Article VI of General Order No. 27, issued by the Railroad Administration reads:

'Colored Firemen, Trainmen and Switchmen—Effective June 1, 1918, colored men employed as firemen, trainmen, and switchmen shall be paid the same rates of wages as are paid white men in the same capacities.

'Back pay for period January 1, 1918, to May 31, 1918, will be based only upon the increases provided in Article II of this order for such positions. Back payments will not apply to the further increased rate made effective by this Article.'

Supplement 12 to General Order No. 27, United States Railroad Administration reads:

'To carry out the intent of Article VI, General Order No. 27, and retroactive to June 1, 1918, it is ordered:

'1. Employees in a passenger train crew, except conductor, collector and baggagemaster, qualified and regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly:

'(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

'(b) Use hand and lamp signals for the protection and movement of trains.

'(c) Open and close switches.

'(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

'(e) Compare watches when required by rule.

'2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

'3. This order shall not curtail the duties of employees heretofore classed as 'train porters.'

'4. This order shall not infringe upon the seniority rights of white trainmen.

W. G. McADOO,
Director General of Railroads.'

Paragraph 5 of General Order No. 8 issued by the United States Railroad Administration, states in part:

'No discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or nonmembership in labor organizations.'

Under these decisions the carrier classified these employees as passenger brakemen and thereafter they received the same rate of pay and the same pay for overtime and extra service as that established for white brakemen.

In Decision No. 2 this Railroad Labor Board said:

'There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages. Adequate investigation and consideration of these questions would demand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason it has been necessary—and both parties to the controversy have indicated it to be their judgment and wish—that the Board should separate the questions involving rules and working conditions from the wage questions. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise, and this decision will be so understood and applied.

'The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions, and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration, and determination of the questions pertaining to the continuation or modification of such rules, conditions, and agreements, no changes therein shall be made, except by agreement, between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions and agreements, further hearings will be had at the earliest practicable date, and decision thereon will be rendered as soon as adequate consideration can be given.

'It is further declared that this Board, finding it necessary to adopt a basis for the rates and advances decided on, has adopted the rates established by or under the authority of the United States Railroad Administration.' (I. R. L. B., 13.)

In Decision No. 119 the Board promulgated certain fundamental principles to govern carriers and employees, several of which deal directly with the case in point:

'6. No discrimination shall be practiced by management as between members and nonmembers of organizations or as between members of different organizations, nor shall members of organizations discriminate against nonmembers or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the legitimate activities of carriers should not be practiced.

'7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

'9. Proper classification of employees and a reasonable definition of the work to be done by each class for which just and reasonable wages are to be paid is necessary, but shall not unduly impose uneconomical conditions upon the carrier.

'15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.' (II, R. L. B., 87.)

Arbitrary Action of Carrier.

It is an admitted fact that on or about January 21, 1921, the carrier notified all colored brakemen that effective February 1, 1921, all positions of colored brakemen were abolished; that these employees would be reclassified as train porters carrying a rate of one hundred twenty dollars

($120) a month, based on 8 hours per day, 240 hours per month. The evidence shows that this action was taken without conference or agreement and that the provisions of the Transportation Act, 1920, and the rules of procedure and decisions of the Board were not complied with in any respect.

The reclassification, rate of pay and conditions governing payments for overtime thus established substantially reduced the earnings of these colored trainmen. The carrier admits that there was no change in their duties.

The Contract.

The contract in effect on this carrier is held by the Brotherhood of Railroad Trainmen. This contract establishes rates of pay and working conditions for brakemen in passenger, freight, and yard service, and under the terms of that contract and in accordance with the decisions of the Board, the compensation for the service rendered applied equally to all brakemen, irrespective of nationality, color, or membership or nonmembership in the organization holding the contract.

The Protest of the Colored Trainmen.

On March 13, 1921, a committee of five, and on July 2, 1921, a committee of nine colored trainmen protested the reductions made effective February 1, 1921.

In the conference July 2, 1921, the officials of the carrier endeavored to have the committee sign an acceptance of the wage reduction and change in working conditions. The committee declined and requested the carrier to join it in submitting the dispute to the Railroad Labor Board. This the carrier declined to do.

The Submission to the Railroad Labor Board.

The dispute was submitted to the Board, July 6, 1921, by O. C. Roark as representative of the employees directly affected. On July 23, 1921, the Board received documents to which were attached 135 personal signatures, out of a total of approximately 145 employees directly involved, as

proof that Mr. Roark was duly authorized to represent the colored trainmen.

Almost immediately after the meeting of July 2, 1921, the carrier, without the knowledge or consent of the employees, drafted what purported to be an agreement between the carrier and the train porters. This alleged agreement was to be effective as of February 1, 1921. The carrier then inaugurated a campaign to secure signatures of acceptance from the individual employees.

On September 2, 1921, Mr. Roark representing the employees, advised the Board of the circulation of this alleged contract stating that the carrier had 'resorted to threats of violence in securing names of colored trainmen for the contract.' A number of letters signed by employees in substantiation of Mr. Roark's charge were also submitted.

On September 10, 1921, the carrier transmitted to the Board an unsigned copy of an alleged agreement between the carrier and its train porters, stating that the contract has been accepted by a majority of its train porters.

Under date of May 29, 1922, in confirmation of its letter of September 10, 1921, the carrier transmitted a copy of the alleged agreement signed by J. E. Hutchinson, general manager, and Sandy Eslinger, as general chairman for train porters, dated December 6, 1921.

Under date of December 10, 1921, Mr. Roark, representing the employees, transmitted to the Board 126 individual signatures attached to several papers generally bearing the following statement, dated December 7, 1921.

'To Whom It May Concern:

'I am in the employ of the St. Louis-San Francisco Railway Company, this date of December 7, 1921. Wish to state to the United States Railroad Labor Board that my reasons for signing company contract was in fear of violence.'

Also under date of December 10, 1921, the following affidavit and telegrams were filed with the Board by Mr. Roark:

'I, Sandy Eslinger was forced to appear at the general manager's office, J. E. Hutchison, at Springfield, Mo., De-

cember 6, 1921. Attached you will find three messages showing how I was forced to come to Mr. Hutchison's office on December 6, 1921.

'I signed the contract, which is attached dated February 1, 1921, through fear of violence as chairman, December 6, 1921, which was not authorized by the colored trainmen of the St. Louis-San Francisco Railway Company for me to do.

'I further state that O. C. Roark was elected representative by 135 votes of the colored trainmen of the St. Louis-San Francisco Railway Company and the signing of the company contract for the colored trainmen is entirely out of my power in regard to their wages. This power was dedicated to O. C. Roark by 135 colored trainmen of the St. Louis-San Francisco Railway Company.'

'I further state that all signatures made by me to statements December 6, 1921, to J. E. Hutchison were unauthorized by the colored trainmen of the St. Louis-San Francisco Railway Company.

(Signed) SANDY ESLINGER.

'State of Missouri } ss.
County of Barry }

'Subscribed and sworn to before me a Notary Public within and for the county and state aforesaid this tenth day of December, 1921.

My Commission expires June 3, 1924.

J. L. HOBBS,
Notary Public.'

'Joplin 147P 12/4

EEM Sandy Eslinger
C/o No. 303.

'Arrange to have train porter Sandy Eslinger report at Mr. Hutchison's office Tuesday morning, December 6. Eslinger answer and say if will be on hand. J. A. M.

'Caller. Deliver when you call him. J. F. S.'

'Sandy Eslinger, Porter. You will go to Springfield and be in Mr. Hutchison's office at 9 am December 6. E. E. M.'

Summary.

The evidence in this case is clear and conclusive. It shows that the carrier has arbitrarily disregarded the rights of these employees and reclassified their titles without changing their duties; that it has reduced their rates of pay and established less favorable working conditions because they are colored men and for no other reason; it has sought to establish a separate and distinct class or craft based solely on the fact that they are of the negro race instead of the white race.

How any authoritative tribunal created by an Act of Congress ostensibly to deal out even-handed justice to citizens, irrespective of race, creed, or nationality, required by law to submit their disputes to it for adjudication, can, in view of the evidence, reach the conclusions expressed in the foregoing decision is well nigh incomprehensible.

The following members voted for the decision: Messrs. Morrow, Baker, Hanger, Higgins, and Hooper.

(Signed) A. O. WHARTON.

Supporting Opinion.

That a railroad should not be permitted to discriminate against an employee on account of his race or color in fixing his rates of pay is a moral and economic truth beyond dispute. It may be confidently assumed that the Railroad Labor Board will recognize the soundness of this principle in any case in which it is submitted without prohibitive complications. The Board, however, must consider cases in the form in which they are presented to it and under the limitations prescribed by the Transportation Act, 1920.

The colored employees concerned in this case are in a somewhat unfortunate position. To begin with, they are not permitted to become members of the white labor organizations, known as the standard organizations. The dissenting opinion in this case, however, argues that these standard organizations must be accorded the right to negotiate all rules and rates of pay for these colored outsiders, because they are in a minority. This simply means that the colored employee not being admitted to membership in the

standard organizations could never have any voice in the making of his working conditions and rates of pay, a right guaranteed to him by the Transportation Act.

To give legal sanction to this discrimination certain representatives of these labor organizations have prepared and had introduced in the Congress of the United States a bill which provides that the adjustment boards which it sets up shall contain representation from the standard organizations alone. Inasmuch as these standard organizations exclude from their membership all colored men, the necessary result of the proposed measure is to legalize an iron-clad act of exclusion against colored railway employees.

Whatever discriminations may be practiced by organizations of individuals they should not and can not constitutionally be indulged in by a governmental body, legislative or administrative. These observations are made with the fullest recognition of the merits of these great labor organizations, but with a keen realization of the necessity of protecting the rights of minorities.

Let it be understood therefore that the question here decided is not that of a wage discrimination against colored men. The question has not yet been passed upon in this case.

Concisely, the situation here presented is this: The carrier reclassified these colored employees as porters instead of brakemen and reduced their pay; 112 out of the total of 145 agreed in writing to the carrier's action. Subsequently, they repudiated this agreement and, in stereotyped, prepared statements, claimed that they had agreed 'through fear of violence.' No evidence whatever of any violence or threat thereof was shown, and the Board could not sustain this claim.

The Board, however, with a strong desire to protect these unorganized employees, did not dismiss their case, but held, in substance, that their repudiation of their agreement could not justly affect what had already taken place but should be construed as an application for relief against the continuation of the alleged injustices complained of.

The question of principle involved is therefore before the Board for full and fair consideration.

(Signed) BEN W. HOOPER.

Attest:

I. M. PARKER,
Secretary.

Q. (By Mr. Packman) Mr. King, I believe you stated you had been associated with the Frisco Railroad about thirty-five years? A. Thirty-six years.

Q. Have the duties of train porters been the same during that time to the best of your knowledge?

A. To the best of my knowledge and belief they have been substantially the same.

Q. Mr. King, if the Frisco Railroad is authorized by this Court to maintain the train porters in its employ free from the agreement of March 7, 1946, and these train porters are receiving lower pay than the other men, wouldn't that be financially beneficial to the Frisco Railroad for these men to be permitted to carry out their functions and duties at this lower overhead cost to the Frisco Railroad?

A. Yes, it would be a financial advantage.

Q. There was no financial reason, then, for the Frisco Railroad to sign this agreement of March 7, 1946, was there? A. No.

Q. It was contrary to your financial interest?

A. There was no financial reason for signing it.

Q. And the overhead costs of running a railroad inevitably reflect themselves in the rates the public has to pay, isn't that so?

A. Well, it can be taken, I think, as a general statement that your costs have a bearing on your charges, that is, at least when you take the railroads of the country.

Q. Mr. King, after the agreement or memorandum of March 7, 1946, was executed, did you cause a notice to be mailed to Mr. Fairchild and others advising them that the practice of train porters performing work generally recognized as brakeman's duties will be discontinued under this agreement, "We will effective April 1, 1946, discontinue all train porter positions"? A. Yes, I did.

Q. That is embodied in your letter of March 9, 1946. We have marked it for our purposes "Plaintiff's Exhibit 44." Will you verify that is a true copy?

A. Yes, that is a true copy.

Q. It was not the intent of the railroad, however, to merely discontinue train porter positions and leave the head end of the train without crew to take over the task theretofore performed by the porter, was it?

A. It was not on all trains. What we had in mind doing was to put head brakemen on a majority of these trains, but we had some where we formerly used train porters and we thought we could get along without putting anyone in there.

Q. That is these short trains, short runs?

A. That would be short trains, and we considered the territory there which they operated in.

Q. Did anyone purporting to speak for or represent the cause of the train porters request the Frisco Railroad to suspend the agreement of March 7, 1946, after they received your notice of March 9, 1946?

A. Yes, they requested that we suspend it.

Q. Did you cause to be sent advice to them in writing that you could not change the decision which will result in discontinuing majority if not all train porter positions effective April 1st? A. Yes.

Q. I refer you to your wire of March 20, 1946. I will have that marked our next exhibit number.

(A Western Union telegram, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 46, 10/15/46, OP.")

Mr. Packman: We offer both of these exhibits in evidence, gentlemen. Are you familiar with what they are?

Mr. Judge: Generally, yes.

(Which said Plaintiff's Exhibits 44 and 46, so offered in evidence, having been previously duly marked for identification, are in words and figures as follows:)

(Plaintiff's Exhibit 44 has been described, infra.)

Plaintiff's Exhibit 46.

(Telegram.)

St. Louis, Missouri
March 20, 1946.

L. W. Fairchild
President, BofTRPSF&RE,
2103 A. Market Street
St. Louis, Missouri

Retel March 19th. For Reasons Stated In My Letter March Ninth and as Further Explained in Our Conference My Office March Eighteenth Cannot Change Decision Which Will Result in Discontinuing Majority if Not All Train Porter Positions Effective April First. This Will Also Serve as Reply to Telegrams of the same Date Addressed to Mr. Worman and to Me Signed James Tillman, S. L. Howard and Others Involved.

C. P. KING
Asst. to Chief Operating Officer
Frisco Railway—9:45 AM

Q. (By Mr. Packman) Subsequently, did a delegation of men, including Mr. Howard, the plaintiff here, Mr. Tillman and others, appear at the office of the railroad company endeavoring to persuade you orally to suspend the order, or rather the memorandum of March 7, 1946? Mr. King, does your file reflect that men, including Mr. Howard, Mr. Tillman, communicated with the Mediation Board at Washington endeavoring to have them intervene in connection with the proposed—

A. (Interrupting) I didn't answer your previous question.

Q. Pardon me.

A. The previous question, as I understand it, was, did I meet with the committee or delegation of the train porters? I did on March 18, met with the following committee of train porters: L. W. Fairchild, General President, Vernon C. Coffey, Director, Attorney, L. H. Hoyle, General Chairman, Henry Thomas Kern, Executive vice-president, James Tillman, vice-president.

Q. Subsequently did you meet with any gentlemen about the same subject matter?

A. The next conference was in my office March 25th and at that conference yourself, Mr. Espy, Mr. Fairchild, Mr. Coffey, Mr. Hoyle, Mr. Howard, Mr. Kern and Mr. Tillman were present.

Q. Was a request made at that time that the enforcement of the agreement of March 7th be deferred and delayed? A. Yes, there was.

Q. In the interim or at or about that time, had your company been advised by the National Mediation Board that an appeal had been made for it to intercede and prevent the action planned for April 1st?

A. We had a telegram addressed to Mr. Worman, March 20, 1946, by Mr. Robert F. Cole, Secretary, National Mediation Board, stating that the Board had received a complaint from certain colored employees of the St. Louis-San Francisco Railway and St. Louis-San Francisco and Texas Railway, concerning alleged agreement between carrier and B. of R. T., effective April 1, 1946, and they asked that we advise date and nature of agreement.

Q. Were you advised by Mr. McFarland of the Adjustment Board that an appeal had been made or some communication in reference to the subject matter?

A. You mean advised by the Adjustment Board itself?

Q. Yes. Did you receive any direct communication from the adjustment Board?

A. I have no reference here or recollection of the Railroad Adjustment Board.

Q. I may be wrong in my recollection as to what they did. Now, was there any discretion left with the management of the Frisco Railroad in view of the signing of the agreement of March 7, 1946, other than repudiation without the intercession of a court of equity to set aside that order?

Mr. Baumann: I object to that question. It calls for a legal conclusion.

The Court: Objection sustained.

Q. (By Mr. Packman) Was there a desire on the part of the Frisco Railroad prior to March 7, 1946, to retain in the future as it had in the past train porters on the run which they had been enjoying.

A. I think it can be fairly stated that that was our preference.

Q. If not for the threat of the strike and its consequential effect on the public and upon the stockholders of the company, your officers would not have agreed to the memorandum of March 7, I take it?

Mr. Baumann: I object to that question, rather to some of the things that were interpolated into it rather than the desire to not have him answer it—if you will reframe it, please.

Mr. Packman: (To the reporter) Would you kindly read the question? (Question read.)

The Court: We are going pretty far in all these matters.

Q. (By Mr. Packman) Was it because of the threat of the strike unless your company acquiesced in the memorandum of March 7th that your company signed that memorandum among other reasons?

A. Well, I think substantially that question was asked of me yesterday and I stated, as I recall it, we had a threat of a strike—we had a strike date set and postponed. We had twelve cases on there that we felt essentjal that we settle in order to avoid a strike. That is about as clear as I can put it.

Mr. Packman: That is all.

Mr. Baumann: No questions.

Mr. Judge: If the Court please, I understand Mr. King will testify for the defendant Frank A. Thompson, Trustee, and I believe it would probably save time if I cross-examined at that time, probably save a lot of duplicate questioning.

The Court: Can you do that without confusing the dual positions in which he is going to appear?

Mr. Packman: We won't make any issue of it.

The Court: Any way to expedite the matter.

Mr. Judge: The Court has been indulgent on the rules of evidence.

The Court: I think we can all say it has been rather informal to say the least, receiving testimony in this case. So proceed anyway you desire.

Mr. Packman: Mr. Espy, will you kindly take the deposition taken in Chicago and have it marked as one next exhibit and read it?

(Which deposition, being the deposition of T. S. McFarland, taken in behalf of the Plaintiff at Chicago, Illinois, October 2, 1946, handed to the reporter, was marked for identification as "Plaintiff's Exhibit No. 47, 10/15/46, OP".)

Mr. Espy: This is Plaintiff's Exhibit No. 47, which is a deposition taken of Mr. T. S. McFarland pursuant to a stipulation on behalf of the Plaintiff at Chicago, Illinois, on the 2nd day of October, A. D. 1946, before Frank M. Harker, Notary Public.

The Court: Gentlemen, is it necessary for the reporter to take this? It is my observation they are read pretty fast. It will be in the file and can be copied if necessary.

Mr. Packman: No, your Honor.

(The deposition above referred to was read into the record with the exception of pages 29 and 30, omitting Plaintiff's Exhibit 3 attached thereto, and continuing reading beginning with Question 97 on page 33, ending on page 52.)

(Plaintiff's Exhibit 47.)

State of Illinois }
County of Cook } ss.

The deposition of T. S. McFarland, a witness of lawful age, produced, sworn, and examined upon his oath, on behalf of plaintiff herein, on Wednesday, the 2d day of October, A. D. 1946, at the hour of 11:00 o'clock a. m. of said day, at Suite 1320, No. 39 South LaSalle street (being the offices of National Railroad Adjustment Board), in the City of Chicago, County of Cook, and State of Illinois, by and before me, Frank M. Harker, a duly commissioned

and qualified notary public in and for said County of Cook and State of Illinois, and authorized by the State of Illinois to administer oaths, and being a disinterested person, not of counsel nor attorney for either of the parties, nor interested in the event of said cause, taken pursuant to the stipulation and agreement by and between the parties hereto, by their respective counsel, in a certain suit or matter of controversy now depending and undetermined in the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, at St. Louis, Missouri, wherein the said Simon L. Howard, Sr., is plaintiff, and Frank A. Thompson, Trustee St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis-San Francisco & Texas Railway Co., a corporation, and Brotherhood of Railroad Trainmen, an unincorporated association, and C. O. Carnahan, General Chairman Brotherhood of Railroad Trainmen, are defendants; the said cause bearing Clerk's General Filing Number: Cause No. 4452, Division No. 2.

Present:

Henry D. Espy, Esq.,
2103A Market St., St. Louis, Mo.,
on behalf of plaintiff;

Alvin J. Baumann, Esq.,
1025 Frisco Bldg.,
St. Louis, Mo.,
on behalf of Frank A. Thompson, Trustee St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis-San Francisco & Texas Railway Co., a corporation, Defendants;

Charles R. Judge, Esq.,
702 Louderman Bldg.,
317 N. 11th street,
St. Louis, Mo.,
on behalf of Brotherhood of Railroad Trainmen, an unincorporated association, and C. O. Carnahan, General Chairman Brotherhood of Railroad Trainmen, Defendants.

And thereupon the following proceedings were had herein:

By Mr. Harker (Notary Public): Let the record show that prior to entering upon my duties in the capacity of shorthand reporter herein, I duly made and subscribed the following oath:

Oath of Shorthand Reporter.

I do solemnly swear that I will well and truly, faithfully, accurately and impartially report in shorthand the proceedings had upon the taking of said deposition herein, and prepare a full, true and correct transcript of my shorthand notes so made as aforesaid, so help me God:

(Signed) FRANK M. HARKER.

Subscribed and sworn to before me this 2d day of October, A. D. 1946:

(Signed) JOSEPH S. GUYETTE, (Seal)
Notary Public, Cook County, Illinois.

My Commission expires May 31, 1947.

And the said

T. S. McFARLAND,

of legal age, produced as a witness on behalf of plaintiff, having been by me, the said Frank M. Harker, as notary public as aforesaid, first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth insofar as he should be interrogated, was examined upon oral interrogatories, and he did thereupon depose, testify and say as follows, viz.:

Direct Examination,

By Mr. Espy:

Q. 1. Will you state your name, please?
A. 1. T. S. McFarland.

Q. 2. What is your address, Mr. McFarland?
A. 2. Office?

Q. 3. Yes. A. 3. 39 South LaSalle street.

Q. 4. Chicago, Illinois? A. 4. Chicago, Illinois.

Q. 5. What is your occupation or profession, sir?
A. 5. Executive Secretary of the First Division of the National Railroad Adjustment Board.

Q. 6. How long have you been Secretary of the National Railroad Adjustment Board?
A. 6. Since its organization in 1934.

Q. 7. How long have you been the Executive Secretary?
A. 7. The same time.

Q. 8. The same length of time? A. 8. Yes.

Q. 9. How many members does the First Division have?
A. 9. Ten.

Q. 10. And can you give us the names of the members of the First Division? A. 10. Yes.

Q. 11. Will you give them to us, please? A. 11. Let's see.
There is Mr. George H. Dugan, Chairman, and Carrier Member;
Mr. M. G. Leech, Vice-Chairman, representing the Brotherhood of Locomotive Engineers;
Mr. William Bishop, representing the Brotherhood of Railroad Trainmen;
Mr. Bruce Dwinell, representing the Carriers; he is a Carrier Member;
Mr. Paul M. Carter, representing the Switchmens Union of North America;
Mr. H. J. Hoglund, a Carrier Member;
Mr. R. J. Tillery, representing the Brotherhood of Locomotive Firemen and Engine Men;
Mr. J. H. Rodgers, representing the Order of Railway Conductors;
Mr. E. C. Gegenheimer, a Carrier Member; and
Mr. T. L. Green, a Carrier Member.

Q. 12. Now, these are all members of Division No. 1?
A. 12. No. 1.

Q. 13. I believe you have some other Divisions, too?
A. 13. Yes.

Q. 14. What Divisions are they? A. 14. Well—

Q. 15. I mean, what are the numbers of them?
A. 15. 2, 3 and 4.

Q. 16. How many members are on the entire Board, if you know? A. 16. Thirty-six.

Q. 17. All these thirty-six members represent either a union or a carrier? A. 17. Yes—not a carrier; carriers.

Q. 18. Carriers. Now, do you have any connection with any of the other Divisions, other than Division No. 1?
A. 18. None.

Q. 19. Who pays the salary of the union representatives on Division No. 1, if you know?
A. 19. Well, the organizations whom they represent.

Q. 20. That is, the union that they represent?
A. 20. Yes.

Q. 21. And who pays the salaries of the carriers' representatives? A. 21. The railroads.

Q. 22. Now, can you give us any idea, Mr. McFarland, how the representatives of the various unions in Division No. 1 are selected?
A. 22. Well, according to the terms of the Railroad Labor Act.

Q. 23. Yes. How are they selected, if you know?
A. 23. I don't know, except in accordance with the terms of that Railway Labor Act, it must be done.

Q. 24. They are elected by the union to represent the union on the National Railway Labor Board, Railroad Adjustment Board?
A. 24. There is a little difference as to the First Division, I think. Are you asking about the First Division?

Q. 25. Yes, the First Division.

By Mr. Judge: I think I will interpose an objection on behalf of Mr. Carnahan and the Brotherhood of Railroad Trainmen, that the Railway Labor Act contains all those things concerning the carriers and speaks for itself.

By Mr. Baumann: You may note the same objection on behalf of the Railways.

By Mr. Espy:

Q. 26. After the Railway Labor Act was passed, I believe in 1934, you had a meeting and organized at that time?
A. 26. Yes.

Q. 27. And those members that were selected were selected by their unions to come here from the start in 1934, to represent the unions on the Board, is that correct?

By Mr. Judge: Mr. Espy, will it be agreeable to you that the objections I have just made carry on through, without repeating?

By Mr. Espy: Yes.

By Mr. Baumann: The same thing.

By Mr. Espy: Yes.

By Mr. Espy:

Q. 28. The same thing is true, is it? Is that correct?
A. 28. Shall I answer?

Q. 29. They represent the union on the Board?
A. 29. Yes.

Q. 30. Their respective unions? A. 30. That is right.

Q. 31. What is the jurisdiction, of what matters did Division No. 1 have jurisdiction over?
A. 31. That is spelled out in the Act.

Q. 32. Would you give it to us for the record, please; Mr. McFarland? A. 32. Want me to read it in?

Q. 33. Yes.
A. 33. (Reading)
"First Division to have jurisdiction over a dispute involving train and yard service employees of carrier; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, and yard service employees."

Q. 34. Now, Mr. McFarland, to your knowledge are there any colored—are there any Negro members of the Board of Railroad Adjustment Board No. 1? A. 34. No.

Q. 35. To your knowledge, has a Negro ever been made a member of your Board of Adjustment of Division No. 1?

A. 35. No. We have got the same members and the same representation all the way through. They have changed somewhat as to the carriers. We have none representing the carrier, none representing the labor.

Q. 36. Does any colored union have a representative on the Railroad Adjustment Board No. 1?

A. 36. I don't know. Oh, Board No. 1?

Q. 37. Yes.

A. 37. No. Wait. You say, does any colored union have a representative on the First Division Board?

Q. 38. That is right. A. 38. No.

Q. 39. Under your procedure, is it permissible to take a change of venue from this Board, Railroad Adjustment Board, Division No. 1?

A. 39. There is no other Board. This is the only Board there is accredited under the Act to handle disputes assigned to the First Division.

I might say and add there, it is my understanding that they have recourse to the Federal Courts.

Q. 40. Well, do you know of any occasion where a change of venue has ever been taken? I mean from one Board to the other Board, or from any Division to any other Division, or anywhere else?

A. 40. No. We have had no requests like that.

Q. 41. Now with reference to the jurisdiction of Railroad Adjustment Board, Division No. 1, does an individual have a right to come before this Board?

A. 41. The Attorney General says so.

Q. 42. What has been the practice of your Railroad Adjustment Board since you have been a member, and I believe you have been a member since its organization?

A. 42. What has been the practice?

Q. 43. What has been the practice where an individual has made application to appear before the Railroad Adjustment Board, Division No. 1?

A. 43. Well, each case is decided and handled on its merits. That is to say—

Q. 44. To your knowledge, do you know of a single case where the Railroad Adjustment Board has ever taken charge of an individual case not being represented by a union?

A. 44. Well, there is one before us now that we are handling in the regular way, the same as any other case.

Q. 45. It has not been decided as yet?

A. 45. No; it has not been given a docket number. But all of the proceedings are identical with any other case.

Q. 46. What type of case is that? Will you tell us something about it? Do you recall?

A. 46. It is a case of reinstatement; reinstatement.

Q. 47. Could you give us some additional facts about it?

A. 47. No.

Q. 48. That type of a case?

A. 48. No, I could not. I haven't it before me.

Q. 49. Do you have a file on that case here in your office?

A. 49. Yes. It is on file in our office.

Q. 50. Do you think it would be possible for you to get that file?

A. 50. No, I don't even show it to a member until it is completed.

Q. 51. Was this individual, do you recall, represented by a union at any time? A. 51. What?

Q. 52. Was he represented by a union when he filed his bill here? A. 52. No.

Q. 53. Mr. McFarland, isn't it the practice of the Railroad Adjustment Board not to take jurisdiction of cases where individuals are involved, or where they are brought by individuals?

A. 53. Well, each case would have to stand on its own merits about those things of practice. If a man submits a case here, it must be in accord with the Railway Labor Act; it must be, first, a dispute between a carrier and it must have been handled up to and including the chief group of officers of the railroad, in the usual manner.

Now, in the usual manner, whatever that is in the railroad, is the one that should be followed in that case.

Q. 54. Well, this case that you spoke of, do you recall the names of the parties? A. 54. Yes.

Q. 55. Will you tell us what the names of the parties are?

A. 55. Well, it is a man by the name of Mason, and it is against the R. G. & W. Railroad.

Q. 56. With the exception of that case, do you have any knowledge at any time that this Board has taken jurisdiction of any individual suit?

A. 56. Now, let me explain about taking jurisdiction. Jurisdiction is taken by the Board when they take up a case for consideration.

Now, I docket cases as they meet the general requirements, and then the act of the Board—if there is any question about jurisdiction or anything, I just tell the parties that that question will be decided and will be considered along with the merits of the case, either at the hearing or, if it is a hearing of a rate case, when the case is taken up by the members for consideration, and that is when jurisdiction is established.

Q. 57. Well, you have not all taken jurisdiction of the case you have spoken of?

A. 57. No. This one, as I say, it is being handled just like the others, just like all other cases; it is up to docket.

Q. 58. Well, has your Board, Division No. 1, of the Railroad Adjustment Board, ever adjudicated a case for an individual? A. 58. I don't recall it.

Q. 59. You don't recall any? A. 59. No.

Q. 60. And it is the general practice that the Board refuses to take jurisdiction.

A. 60. No, indeed, no, indeed.

Q. 61. You are familiar, Mr. McFarland, are you not, with that pamphlet (handing pamphlet to the witness)?

A. 61. I would not qualify myself as being familiar with it, no.

By Mr. Espy: This is a pamphlet, Document No. 10, 77th Congress, First Session, Administrative Procedure in Government Agencies; monograph of the Attorney General's Committee on Administrative Procedures, embodying the results of the investigations made by the staff of the Committee relative to administrative practices and procedures of the several agencies of the Government, Part 4, which has reference to railway labor, the National Railroad Adjustment Board, and the National Mediation Board.

This is put out by the United States Government printing office, Washington, 1941.

By Mr. Espy:

Q. 62. I ask you, Mr. McFarland—I am reading from the foot note on page 7, Foot Note No. 15 on page 7 of this pamphlet, which reads as follows:

"The Secretary of Division No. 1 says that he has been instructed that he is not to inform individuals who seek to petition the Board that the Board will not consider claims asserted by individuals."

A. 62. Read that over.

Q. 63. (Reading)

"The Secretary of Division No. 1 says that he has been instructed that he is not to inform individuals who seek to petition the Board that the Board will not consider claims asserted by individuals. He therefore uses his ingenuity in explaining the reasons for rejecting cases and is forced to write many equivocal letters, if a party or his representative comes into the office of the Board. However, the Secretary tells him orally and confidentially the reason for refusing to docket the case."

A. 63. Now, what is your question?

Q. 64. I am asking you whether or not you recall making that statement. A. 64. The case is not through.

Q. 65. I am asking you whether or not this report from Congress, the Senate, is correct.

A. 65. The statement is a mistake. We do not refuse to take cases, do not refuse to take one.

Q. 66. But in all cases thus far, they have refused—they refused to adjudicate it after they investigate, is that correct?

A. 66. We have not refused to adjudicate cases at all. We do not decline to accept them. But in all so far they failed to qualify as to the requirements of the Railway Labor Act.

Q. 67. Did you notify the Attorney General when you read this that this was a mistake or error? A. 67. No.

Q. 68. Don't you think it was your duty to advise him that that was a mistake, so far as—

A. 68. No, I don't think so.

Q. 69. You don't think so?

A. 69. The only thing about that is, we do not and have not declined to take a case. We have not notified anybody that we would not take a case.

And another thing, nobody has instructed me to tell people, or not to tell people we should not take cases.

Q. 70. In other words, you do not affirmatively take the position that the Board does not have jurisdiction of any case— A. 70. Our Board—

Q. 71. I say, you do not take the affirmative position that the Board does not have jurisdiction to hear an individual case, is that correct?

A. 71. We just don't take any stand at all on it. You said, will it take a case, and I said that each case that comes in stands on its merits.

Q. 72. Stands on its merits. It is referred to the full Board, is that right?

A. 72. It depends upon whether we take it or not. If a case conforms to the requirements of the Railway Labor Act, then it is docketed, and after that they may find we do not have jurisdiction.

Q. 73. And then they meet and decide whether they have jurisdiction, after it is docketed, is that right? A. 73. Yes.

Q. 74. Isn't it a fact, Mr. McFarland, when they have discussed these cases, the labor members have voted solidly against jurisdiction? A. 74. Oh, no.

Q. 75. Sir?

A. 75. I don't know about that. I don't think so.

Q. 76. Do you have any case or any claim that has been filed by an individual, which has been brought before the Board, that you could say that the labor members present have not voted solidly against taking jurisdiction?

Do you recall any certain case?

A. 76. No, I don't recall any particular case. They have not voted on a case of that kind. They go into it with a view to seeing—with a view to ascertaining or deciding whether it comes within their jurisdiction.

Q. 77. What was your occupation, Mr. McFarland, before you became connected with the Board?

A. 77. Well, I was with the Board in New York and, before that, I was with the railroad, prior to that.

Q. 78. What was your connection with the railroad? I mean, in what capacity?

A. 78. Well, I was with the American Association of Railroads; I was Assistant to the Chairman, at Washington.

Q. 79. Is that connected with a labor union? A. 79. No.

Q. 80. Or with the railroads themselves?

A. 80. The railroads.

Q. 81. The railroads. Who pays your salary?

A. 81. The Government.

Q. 82. The Government pays your salary. Now, Mr. McFarland, I am going to read the second paragraph on page 7 of that same pamphlet, and I will ask you whether this is correct; this is the pamphlet that I have already described in the record.

It says (reading):

> "The Board does not affirmatively take the position that claims of individuals may not be asserted before it."

I believe you stated already that is set forth. A. 82. Yes.

Q. 83. I read further (reading):

> "The labor members solidly vote in each instance not to consider claims asserted by individuals."

A. 83. I don't think they have ever voted on a question of that kind alone. I don't know.

Q. 84. But you do know, to your knowledge, they have never considered an individual case, don't you?

A. 84. Well, I don't recall any; I don't recall any that has been considered. But if it did not reach the Board, it was because it did not come within the requirements—did not meet the requirements of the Railroad Labor Act. I give it the "once-over," you might add, to see if it does meet, see for instance that it is made up properly, in accordance with the requirements of the Labor Railway Act which was set forth clearly and put into the hands of anybody who has got a claim to make. It is put into their hands, all the requirements of the Railway Labor Act, in conformity with our Circular No. 1, which is a reproduction of the jurisdiction, and so forth, and it tells the procedure to be followed; and if they do not come up to that—if they do not follow these procedures, the cases are not docketed.

Now, I do not recall any individual's coming in—we have had a lot of them, but I do not recall any that got by, that followed these requirements.

Q. 85. How many would you say, Mr. McFarland, if anybody, individual claims have been presented?

A. 85. I would not know. I keep no record of that. We keep a record only of the cases after they have been docketed.

Q. 86. Would you say that prior to 1941 some 400 cases have been presented to the Board; would you say that would be correct, approximately, according to this pamphlet?

A. 86. Well, it depends upon what you mean by "case."

Q. 87. I will read this portion of the pamphlet. It says (reading):

> "In some 400 cases since the establishment of the Board individuals have been said to assert claims before the Board."

A. 87. We might have had letters from that many, letters stating that they had a claim against some railroad.

Q. 88. What is the procedure to get a claim before the Board?

A. 88. Well, we will introduce, if you like—I will say to the attorney, if he would like, I will give him a copy of the circular with the requirements.

Q. 89. That specifies the requirements that you have to follow to get before the Board? A. 89. Yes.

Q. 90. And if a person wrote you a letter, you would advise him that—

A. 90. I would send him a copy of the circular.

Q. 91. You would send him a copy of the circular?

A. 91. Yes. Do you want a copy of that circular?

Q. 92. I will get to it. Mr. McFarland, do you remember, or do you recall about March 19, 1946, of receiving a telegram from James Tillman and S. L. Howard?—

A. 92. Have you got it there?

Q. 93. I show you a copy of telegram dated March 19, 1946 (handing document to the witness); do you recall receiving that? A. 93. Yes.

By Mr. Baumann: May I say at this time, on behalf of the carrier defendants, we will admit the authenticity of this telegram and probably the reply and the other telegram.

But we would like to register an objection to the materiality and relevancy in this proceeding.

By Mr. Judge: The same objection.

By Mr. Espy: At this time I am going to have this telegram dated—a copy of the telegram, dated March 19, 1946, addressed to Mr. T. S. McFarland, Secretary, First Division, National Railroad Board of Adjustment, Chicago, Illinois, marked as Plaintiff's Exhibit 1, and offer it in evidence.

By Mr. Espy:

Q. 94. Mr. McFarland, I will show you a telegram sent from Chicago, Illinois, on the 20th of March, 1946, to James Tillman, S. L. Howard, Otho McKinney and others, 2103A Market Street, St. Louis, Missouri, and signed by Mr. T. S. McFarland, Executive Secretary (handing document to the

witness), and I ask you whether or not that is a telegram that you sent? A. 94. Yes.

By Mr. Espy: I offer that in evidence as Plaintiff's Exhibit 2, and I ask to have it received in evidence.

By Mr. Baumann: Objected to, the same objections, of course.

By Mr. Judge: Yes, the same objections.

By Mr. Espy: That is all right.

Q. 97. Now, Mr. McFarland, you advised Mr. Tillman and Mr. Howard on the 20th of March that the Railway Labor Act does not give the Railway Labor Board jurisdiction over negotiations concerning agreements?

By Mr. Judge: I would like to object to that on the ground the Railway Labor Act speaks for itself, and the telegram speaks for itself.

By Mr. Baumann: The same objection. I think it goes along with the running objection we made to the interpretation of the Act.

By Mr. Judge: Yes.

By Mr. Espy:

Q. 98. Will you answer that, Mr. McFarland?

A. 98. Yes.

Q. 99. Did you know at the time that Mr. Howard was an employee of the 'Frisco Railroad at the time you sent this telegram? A. 99. No.

Q. 100. That telegram advised you of that fact, did it not? That telegram of March 19, 1946?

A. 100. Well, it does not plainly state that he is employed by the 'Frisco Railroad. The deduction may be there. It would be a rather long-around-about way to give you information he was an employee of the 'Frisco Railroad, because he said he was going to lose his job.

Q. 101. I will ask you this: You stated in this telegram that the Railroad Adjustment Board did not have jurisdiction over negotiations concerning agreements.

Did you mean by that that the Adjustment Board—Will you just tell us what you meant by that when you stated that they did not have jurisdiction?

A. 101. I meant that they did not take jurisdiction over negotiations for the purpose of making agreements between the carrier and some organization, whoever was negotiating.

Q. 102. Well, they advised you in this telegram if that agreement was complied with April 1st that they would lose their jobs, and your Board would not have jurisdiction to intervene in a case like that?

A. 102. No. They were negotiating some agreement, weren't they? Wasn't it about an agreement?

Q. 103. It was about an agreement entered into by the B. R. T. and the 'Frisco Railroad.

A. 103. Well, they asked us to set aside that agreement. We would not have any right to set it aside.

Q. 104. Would you have any authority— A. 104. No.

Q. 105. —to adjudicate?

A. 105. Well, not a case sent in by wire. It has to come in—if a case comes in, it must come in under the provisions of the Railway Labor Act, which are set out in Circular No. 1.

We cannot even pass on questions that are not submitted in the regular manner provided by the Act.

Q. 106. Do you have jurisdiction, Mr. McFarland, over colored trainmen, porters or [bakesmen] in train service, operating on the 'Frisco Railroad; would you have jurisdiction? A. 106. No.

Q. 107. You would not? A. 107. No.

Q. 108. As a matter of fact, you would have no authority to decide any matter affecting them and affecting the railroad company either?

A. 108. You are talking about train porters, aren't you?

Q. 109. Train porters, yes. A. 109. No.

Q. 110. You would have no jurisdiction at all over them?

A. 110. No.

Q. 111. Do you have jurisdiction over colored trainmen that may be on the trains?

A. 111. When you say "jurisdiction over colored brakemen," you mean to say, do we have jurisdiction over claims submitted by them?

Q. 112. Yes, sir.

A. 112. If they are submitted in accordance with the Railway Labor Act, I would say yes.

Q. 113. In other words, if they are submitted by a union you would listen to them, is that correct—or would a union have to present them?

A. 113. No. We would listen to them, no matter who sent them in.

Q. 114. I see.

A. 114. As long as it complied with the Act.

Q. 115. Do you have any instance where a Negro trainman has ever presented to the Board any matter that affected him as an individual, that your Board looked into or investigated or adjudicated?

A. 115. I don't know—I would not know whether he was a Negro or a colored brakeman or not; we do not take those things into consideration, and the correspondence would not show it. If it did, that would not make any difference to us.

Q. 116. As a matter of fact, aren't those hearings held here in Chicago; or, where are they held?

A. 116. All hearings are held here.

Q. 117. In Chicago? A. 117. Yes.

Q. 118. Do witnesses appear before your Board?

A. 118. No.

Q. 119. How do you conduct your investigation?

A. 119. It is conducted by representatives of the claimants.

Q. 120. Representatives of the claimants?

A. 120. Not witnesses. We don't take testimony from witnesses. They write out a submission, as it is provided for in our requirements; it is set up under the require-

ments of the Railway Labor Act. Both sides send in their submissions, they call them, and they sometimes have hearings, and they can enlighten the Board as to their meaning of the different things that are said in their submissions, call attention to the salient points; but no introduction of evidence.

Q. 121. No introduction of evidence?

A. 121. It is all in the submission.

Q. 122. Are you familiar with the facts in this case, Mr. McFarland? A. 122. No, I am not.

Q. 123. Well, I might state this, that this is a 'Frisco Railroad case; Mr. Thompson is Trustee of the St. Louis-San Francisco Railroad and St. Louis-San Francisco & Texas Railroad, who advised all of the colored train porters and brakemen, effective April 1, 1946, that their positions would be abolished and that white brakemen would take their places.

Would you have jurisdiction to do anything — your Board, to do anything in a matter of that kind?

By Mr. Judge: I object to that; it is speculative and there is no claim presented.

By Mr. Espy: No; I am just asking, of his own knowledge, whether or not he would have jurisdiction.

By the Witness:

A. 123. Now, you approach that from the standpoint of train porters—

By Mr. Baumann: I object.

By Mr. Espy:

Q. 124. Train porter or brakeman.

By Mr. Judge: I must put in my objection, because Mr. McFarland has indicated in his previous testimony he is not the one who passes on the jurisdiction of Division 1; that it is a matter for the members of the Division to pass on.

Note my objection.

By Mr. Espy:

Q. 125. I will state this: Would you docket a case of that type?

A. 125. Now, wait a minute. You are talking about train porters cases. I would not docket a train porter's case, because that goes to the Fourth Division.

Q. 126. You would not docket a train porter's case?

A. 126. No, not a train porter. We have no jurisdiction over that claim.

Q. 127. What classifications does a train porter come under, if you know? A. 127. You mean what Division?

Q. 128. Well, what classification—what is the term, is it a trainman?

A. 128. A train porter might be a trainman. We only know the Railway Labor Act in this, and it specifies what Division should have jurisdiction over certain crafts or employes.

Q. 129. Now, what crafts do you have jurisdiction over, would you tell us that?

A. 129. That is in the record; engineers, firemen, conductors, trainmen, yard men.

Q. 130. But your Board does not consider a train porter, a trainman or a yard man, is that correct?

A. 130. Well, I would not speak for the Board on that; they would have to.

Q. 131. Do you consider them as such?

A. 131. Personally?

Q. 132. Yes.

A. 132. In my railroad experience, why—I do not consider them trainmen. They are train porters; and a brakeman is classified as a brakeman.

Q. 133. Assume a train porter was doing the same work that a brakeman was doing.

A. 133. I would not know.

Q. 134. What is that?

A. 134. I would not know. If he was doing the same work a trainman was doing?

Q. 135. Yes. Would you consider him a trainman or a brakeman?

A. 135. That would depend on what he was employed for by the railroad, I would think. The railroad classifies employes.

Q. 136. Now, Mr. McFarland, these hearings that you conduct, isn't it a general practice that the union that is affected, the representatives are always present at the hearings? A. 136. At the hearings?

Q. 137. Yes, sir; the union that is affected?

A. 137. Generally, yes.

Q. 138. And the others very seldom go?

A. 138. What do you mean by that?

Q. 139. The other members of the Board.

A. 139. Oh, all the members of the Board are there or at the hearing they might have two or more members to conduct a hearing.

If you are asking—if I get your question, you are asking me if the Board members representing these unions—

Q. 140. No. I am asking you this: Isn't it a general practice that the union that is affected is generally the one represented at the particular meetings when that particular matter comes before the Board?

A. 140. No, that is not.

Q. 141. That is not correct?

A. 141. I thought you meant hearings. No. Since I have said I thought you meant hearings, in order that it may not be misunderstood, something I said before, ever at the hearings the Board member representing that particular union might not be present at the hearings.

Q. 142. Now I will ask you this: Could you explain to us why you sent this telegram, saying that your Board had no jurisdiction, telegram of March 19th, 1946?

A. 142. Well, because I wanted to tell you that is the reason why they could not do it.

Q. 143. Why was it you just could not do it?

A. 143. We did not have any jurisdiction. The Railway Labor Act does not give us jurisdiction.

Q. 144. It does not give you jurisdiction. You did not send them a pamphlet or anything concerning that?
A. 144. I don't recall.

Q. 145. Are these claims presented on a blank?
A. 145. On a what?

Q. 146. On a blank. Do you have blanks, or a form?
A. 146. No; no, we do not.

Q. 147. Now, at the time you sent this telegram, had you been in [tocuh] with Mr. Cole? A. 147. No.

Q. 148. You had not communicated with him?
A. 148. No.

Q. 149. Do you have any knowledge Mr. Cole was perhaps sent copies of every telegram? A. 149. No.

Q. 150. Have you at any time discussed this matter with Mr. Cole? A. 150. No.

Q. 151. Have you discussed it with any representative of the B. R. T.?
A. 151. No; not as representative of the B. R. T.

Q. 152. Who have you discussed it with?
A. 152. Discussed this with?

Q. 153. Yes, this case of train porters.
A. 153. I don't know anything about it; I have not discussed it.

Q. 154. You don't know anything about it. You have discussed it with Mr. William Bishop?
A. 154. No. You mean the train porter's case?

Q. 155. Yes, sir.
A. 155. No. We have nothing here about that.

Q. 156. Have you discussed Mr. Howard's case, Howard v. Frisco Railroad— A. 156. No.

Q. 157. —with anyone?
A. 157. No; because I know nothing about it.

Q. 158. Do you have any superior, Mr. McFarland?
A. 158. What?

Q. 159. Do you have any superior?
A. 159. Yes; the Board.

Q. 160. The Board is your superior? A. 160. Yes.

Q. 161. And do you have instructions from the Board?
A. 161. Yes, the First Division.

Q. 162. From the First Division? A. 162. Yes.

Q. 163. Do you receive them from the Board as a whole—
A. 163. No.

Q. 164. —or— A. 164. No; only the First Division.

Q. 165. Only as the First Division. What is the condition of your docket at the present time?
A. 165. Well, we have about—

Q. 166. Your docket.
A. 166. —2,800 cases; maybe a few more, awaiting attention.

Q. 167. About what length of time will it take you to catch up with these cases, assuming you make the same progress you made in the past?
A. 167. Two or three years.

Q. 168. In other words, you are about three years behind at this time, with your docket?
A. 168. Yes; unless of course—I will qualify that by saying, unless some action is taken to step up the progress, or step up the object of handling of cases.
Of course, that is always possible.
But you asked about the past; and judging from the number we have got now, by the past, it is about two years.

By Mr. Espy: I think that is all.
Do you have any questions?

By Mr. Baumann: I think I will ask him one or two.

Cross Examination.

By Mr. Baumann:

Q. 169. Mr. McFarland, is it or isn't it a fact that each Division of the Board acts individually in determining the jurisdiction of cases? A. 169. Independently, yes.

Q. 170. Independently. There is no way for—if you reject, if the Board in Division 1 rejects jurisdiction of a case, that is the individual action of the Board—
A. 170. Yes.

Q. 171. —of the Division?

A. 171. Yes. It is with us. I suppose it is so with the others.

Q. 172. Is there any way for an employe or an employee's organization having a case in which you reject jurisdiction, speaking of action by the Board, for it to go to another Division of the Board? A. 172. Yes; they do that.

Q. 173. But each Division would still act independently?

A. 173. That is right.

Q. 174. In the early part of your testimony you referred to the fact that the employe members represented their individual unions.

Isn't it a fact that the employe members on the Board do represent more than one union at times?

A. 174. Well, when you are representing a union, they are appointed by that union. We happen to have one member from each of the five unions. But in their action in the Board room, of course they pass on any case regardless of what union it came from or what employes or what craft or classification of employes submitted the case.

Q. 175. It all depends on the terms of the Ac , generally speaking— A. 175. That is right.

Q. 176. —as to the salaries of the carrier representatives and employe representatives? A. 176. Yes.

Q. 177. All right. I think that is all.

A. 177. (Continuing) No two members can be from any one organization.

Cross Examination,

By Mr. Judge:

Q. 178. Mr. McFarland, you personally do not decide any claims?

A. 178. No. That is the Board; the Board decides them.

Q. 179. From the facts presented to you by wire, and otherwise; have you or have you not attempted to state whether Mr. Howard, the plaintiff here, has any claim?

A. 179. No, I have not.

Q. 180. You don't know?

A. 180. I don't know anything about it, except what is put out here (indicating).

Q. 181. Do you regard the class of craft of train porters as a separate class of craft from a brakeman? A. 181. Yes.

By Mr. Judge: I believe that is all.

Redirect Examination,

By Mr. Espy:

Q. 182. Do you keep a record, Mr. McFarland, of the cases that you have been unable to decide?

A. 182. What did you say?

Q. 183. Do you keep a record of the cases that have been deadlocked, I might say, where the railroads or the carrier representatives all voted one way, and the unions' representatives voted the other way, just the opposite?

A. 183. Do we keep a record of that?

Q. 184. Of all cases, just the opposite, whether the railroad or the carrier was on this side, or the railroad was on that side, and the union—

A. 184. No, no. We have a way of getting a decision on those cases—call in a Referee. If the case is sufficiently deadlocked we get an eleventh member, and he is called the Referee, and the decision is rendered in that way.

Q. 185. About what percentage of your cases are deadlocked, would you say? Can you give us an idea on that?

A. 185. Well, I would say around—it has been going up a little; around thirty; perhaps a little higher now.

Q. 186. About thirty percent of them you would say were deadlocked? A. 186. Yes.

Q. 187. Would you state of your own knowledge whether or not the 'Frisco Railroad has a representative on this Board? A. 187. Well, you mean—

Q. 188. He is a railroad member?

A. 188. He is a member from the 'Frisco Railroad—

Q. 189. Yes. A. 189. So he works for the 'Frisco?

Q. 190. Yes. A. 190. No.

Q. 191. They have not?

A. 191. All the carriers represent the 'Frisco and every other railroad in the cases.

By Mr. Espy: I think that is all. Do you want a stipulation that we have this deposition signed, or do you want to read it?

By Mr. Judge: It does not matter, as far as I am concerned.

By Mr. Baumann: It does not matter as far as we are concerned. I would like to order a copy now.

By Mr. Judge: Well, I would like to do the same thing.

By Mr. Baumann: We want a copy.

By Mr. Espy: It is hereby stipulated and agreed by Mr. Baumann, attorney for the 'Frisco Railroad, and Mr. Judge, attorney for the Brotherhood of Railroad Trainmen, and Mr. C. O. Carnahan, and Mr. Henry D. Espy, the attorney for the plaintiff, that the signature of Mr. McFarland is waived.

Is that correct, Mr. Judge?

By Mr. Judge: Yes.

By Mr. Baumann: That is right.

By the Notary: Do you waive the reading of the deposition and the signing of the same?

By the Witness: Yes.

(Deposition closed.)

The reading of his foregoing fully transcribed deposition and the signing thereof by the said witness, T. S. McFarland, were by stipulation by and between counsel for the respective parties present at the taking of said deposition, and by the witness, duly waived.

(Signed.) FRANK M. HARKER, (Seal)
Notary Public, Cook County, Illinois.

My Commission expires Feb. 25, 1950.

Mr. Judge: If the Court please, there were two things referred to in that deposition that weren't identified at the time. One is the opinion of the attorney general, which

was referred to in the testimony, and the other is Circular No. 1 of the National Railroad Adjustment Board. I would like leave to have them identified at this time.

The Court: Very well.

(Which documents, handed to the reporter, were marked for identification as "Brotherhood's Exhibits 3 and 4, 10/15/46, OP", respectively.)

The Court: All right, proceed.

Mr. Packman: If your Honor please, we submit our case in chief at this time, subject to rebuttal.

The Court: Very well.

Whereupon, the plaintiff rested his case.

Afternoon Session, Tuesday, October 15, 1946.

Pursuant to adjournment as aforesaid, at one-thirty o'clock p. m. of said Tuesday, October 15, 1946, the Court met, present and presiding as before, and the trial proceeded as follows:

The Court: All right, you may proceed.

Defendants' Case.

Whereupon, the defendants, to sustain the issues in their behalf, offered testimony, oral and documentary, and made admissions as follows:

Mr. Stewart: If your Honor please, Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company and St. Louis-San Francisco and Texas Railway Company, two defendants here, sometimes I will refer to them as carriers.

The Court: Well, as I understand, they are both the same, that is, it is a mere matter of fiction.

Mr. Stewart: One is a Texas corporation located wholly in Texas.

The Court: In Texas, that is right.

Mr. Stewart: But it is also a defendant in this case. It will become necessary in referring to some of these exhibits to refer to both of them by calling them the "carriers" collectively.

C. P. KING

being previously duly sworn, recalled to the stand as a witness on behalf of the defendants, testified as follows:

Direct Examination.

By Mr. Stewart:

Q. Mr. King, you have been sworn, I believe? A. Yes.

Q. And heretofore testified. You are assistant to the chief operating officer of the St. Louis-San Francisco Railway Company? A. Yes, sir.

Q. Who is the chief operating officer?

A. Mr. H. L. Worman.

Q. What connection has he with the St. Louis-San Francisco and Texas Railway Company? A. Vice-president.

Q. Are you assistant to him in that capacity as vice-president also? A. I am.

Q. What are your duties in your capacity as assistant to the chief operating officer with respect to contracts entered into between the railway and the various organizations of employees, labor organizations.

A. To negotiate contracts, negotiate changes in contracts governing wages and working conditions and to handle grievances, or disputes which may arise in connection therewith.

Q. How long have you been engaged in that?

A. Well, I have been engaged in that type of work to a more or less extent since 1920.

Q. You have been assistant to the chief operating officer in matters of that nature for how long?

A. Since November 1, 1939.

Q. Continuously? A. Continuously.

(Documents handed to the reporter were marked for identification as "Carriers' Exhibits B, B-1, B-2, and B-3, 10-15/46, OP", respectively.)

Mr. Stewart: It has been agreed, I believe—

Mr. Packman: (Interrupting) The verity is not being challenged.

Q. (By Mr. Stewart) Mr. King, I hand you a document identified as Carriers' Exhibit B, entitled "Agreement between J. M. Kurn and Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters represented by the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated", and ask you what that document is.

A. That is an agreement between the trustees of the railway and the recognized representative of the train porters and chair car porters covering hours of service, wages and working conditions.

Q. Was that contract negotiated with you? A. It was.

Q. With the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated on behalf of the train porters and chair car porters? A. It was.

Q. It was executed by you, I believe, as assistant to the chief operating officer of the Frisco? A. That is correct.

Q. And by L. H. Hoyl, General Chairman, Vernon C. Coffey, Director-General Attorney, and L. W. Fairchild, General President, on behalf of the train porters and chair car porters? A. That is correct.

Q. I [had] you a document identified as "Carriers' Exhibit B-1, entitled 'Agreement between J. M. Kurn and Frank A. Thompson, Trustees, St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters, represented by the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated'", and ask you what that document is.

A. That is an agreement to cover an increase in wages for train porters and chair car porters and also granting them a vacation.

Q. That was executed on behalf of the railway by you as assistant to the chief operating officer, was it? A. It was.

Q. And by the same officers of the porters' brotherhood on behalf of the train porters and chair car porters?

A. Yes, sir.

Q. What is the date of that agreement?

A. That was signed at St. Louis, Missouri, February 3, 1944.

Q. I omitted to ask you the date of the first agreement.

A. The first agreement was signed at St. Louis, Missouri, February 2, 1944.

Q. I hand you a document identified as "Carriers' Exhibit B-2," entitled "Vacation Agreement between J. M. Kurn and Frank A. Thompson, Trustees, St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters, represented by the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated," dated September 22, 1944, and ask you what that document is.

A. This is an agreement with the train porters and chair car porters as represented by their authorized representative, supplementing the agreement of February 3, 1944, and contains a detailed set of stipulations as to granting vacation.

Q. These three agreements were executed by you on behalf of J. M. Kurn and Frank A. Thompson. Where is Mr. Kurn? A. Mr. Kurn is dead.

Q. And Frank A. Thompson is the sole trustee of the Frisco at present? A. That is correct.

Q. I hand you a document identified as "Carriers' Exhibit B-3", and entitled "Agreement between Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters, represented by the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employes, Incorporated", dated July 31, 1946, and ask you what that document is.

A. This is an agreement between Mr. Thompson as trustee of the railway company and train porters and chair car porters, represented by their duly constituted representative providing for increase in rates of pay.

Q. Now, Mr. King, is this agreement of February 2, 1944, identified as Carriers' Exhibit B, as supplemented and modified or amended by the three exhibits, three contracts, Exhibits B-1, B-2 and B-3, specifically, still in force and effect? A. Yes, sir.

Mr. Stewart: I offer these four [coontracts] in evidence, your Honor.

The Court: Received in evidence.

(Which said Carriers' Exhibits B, B-1, B-2 and B-3, so offered in evidence, having been previously duly identified, are in words and figures as follows:)

Carriers' Exhibit B.

Excerpts From
Agreement
Between
J. M. Kurn and Frank A. Thompson, Trustees
St. Louis-San Francisco Railway Company, Debtor,
and
Train Porters and Chair Car Porters
Represented by the
Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees,
Incorporated.

* * * * * * *

Article I.

Rule 1. Where this Agreement refers to "Train Porters", it is understood it applies to Train Porters only; where it refers to "Chair Car Porters", it applies to Chair Car Porters only; where it refers to "Porters" it includes both train porters and chair car porters.

Article II.

Rule 2. Porters when on duty will be under the jurisdiction of conductor and will perform such duties as may be required. It is understood that chair car porters will be restricted to keeping cars clean, assisting passengers, assisting in loading and unloading passengers and work of similar nature, and that such duties may also be required of train porters whether or not chair car porters are employed.

* * * * * * *

Article V.

* * * * * * *

Rule 19. Separate seniority rosters of train porters and chair car porters, showing the names and date of seniority

will be posted for inspection of employes interested. Seniority rosters will be revised and posted in January and July of each year and shall be open for correction for a period of thirty (30) days from date of posting, on presentation of proof of error. Seniority dates not protested within thirty (30) days following date of posting first seniority roster issued, shall be considered permanently established. Copy of seniority rosters will be furnished employes' representative.

* * * * * * *

Rule 22. Seniority rights of porters are restricted to service as such in passenger service.

Article VI.

Rule 23. It is understood porters will be used only on such trains as the Company designates.

Article VII.

Rule 24. Porters shall not be suspended, discharged or unfavorable entries made against their records, without just and sufficient cause. In case a porter is taken off his run he shall be given a hearing within ten days from the time he is taken off, and shall be given sufficient notice in person or writing, in advance, to have a representative of his own choice present. Charges shall be specific, and he shall have the right to produce witnesses to testify in his behalf. If a porter is found guilty he will be notified in writing within ten days discipline assessed and cause. If held out of or removed from service unjustly, he will be reinstated and paid for all time lost, less amounts earned in other employment. If a porter feels that he has been unjustly dealt with he shall have the right of appeal within thirty days to his superior officer through the Local and General Chairman.

* * * * * * *

Article X.

Rule 27. Train porters will load and unload train boxes, clean and fill lamps and perform such other duties as may be assigned to them by proper authority.

Article XI.

Rule 28. Nothing in this Agreement shall be construed as applying to porters on parlor cars, business cars, cafe or sleeping cars.

Article XII.

Rule 29. This Agreement is subject to requisite Governmental approval.

Rule 30. Either of the parties to this Agreement desiring to revise or modify these rules shall give thirty (30) days written advance notice containing the proposed changes and conferences shall be held immediately on the expiration of said notice unless another date is mutually agreed upon.

Signed at St. Louis, Missouri, this 2nd day of February, 1944.

For—J. M. Kurn and Frank A. Thompson, Trustees
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor,
By (signed) C. P. KING,
Assistant to Chief Operating Officer.

For—Train Porters and Chair Car Porters
By (signed) L. H. HOYT,
General Chairman.
(signed) VERNON C. COFFEY,
Director-General Attorney.
(signed) L. W. FAIRCHILD,
General President.

Q. (By Mr. Stewart) Mr. King, during the latter part of December, 1944, did you receive information that the Brotherhood of Railroad Trainmen on the lines of St. Louis-San Francisco Railway Company, and the St. Louis-San Francisco and Texas Railway Company, were circulating a strike ballot? A. Yes, sir, I did.
Q. Have you seen that strike ballot at any time?
A. I have.

(The strike ballot, handed to the reporter, was marked for identification as "Carriers' Exhibit C, 10/15/46, OP".)

Q. I hand you a document identified as Carriers' Exhibit C and ask you if that is a copy of the strike ballot to which you have just referred? A. It is.

Q. Will you read Case No. 3 listed in that ballot?

A. Case No. 3. "Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co and claim that additional brakemen covered by and paid under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained."

Q. There are some twelve disputes of cases listed in that ballot, is that correct? A. That is correct.

Q. And the one you have just read is Case No. 3?

A. Yes, sir.

Q. If your Honor Please, I desire to introduce this exhibit, Carriers' Exhibit C.

The Court Received in evidence.

(Which said Carriers' Exhibit C, so introduced in evidence, having been previously duly identified, is in words and figures as follows:)

Carriers' Exhibit C.

(Parts deemed irrelevant have been omitted from printed record.)

Official Ballot

December 21, 1945

To All Members of the Brotherhood of Railroad Trainmen and Others Employed in Train and Yard Service by the St. Louis San Francisco Railway Company and the St. Louis San Francisco & Texas Railway Co.

Dear Sirs and Brothers:

The General Committee representing the Brotherhood of Railroad Trainmen has earnestly endeavored for a con-

siderable length of time to adjust certain disputes with officials of the Company, and on a number of occasions was assisted by Grand Lodge officer, without reaching an agreement.

Notice was served on the management November 27, 1944, for abrogation of the agreement which became effective April 16, 1939. Conferences were had on the several matters without reaching an agreement. Being unable to [affect] a settlement action was taken by the General Committee of the Brotherhood of Railroad Trainmen and approved by the Chief Executive to submit to you for your consideration and action pursuant to the governing laws of the organization, the following cases which are predicated on violation of rules, and settlements of the N. R. A. B. First Division. Awards and settlements of the management and the refusal of the management to cancel the agreement effective April 16, 1939.

* * * * * * * * *

Case No. 3.

Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co. and claim that additional brakemen covered by and paid under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained.

* * * * * * * * *

Respectfully submitted,

(s) C. O. CARNAHAN,
General Chairman, BofRT.

Approved:

(s) J. A. RASH,
Deputy President, BofRT.

Springfield, Missouri
December 21, 1945

To Members and [Others] Employes in Train and Yard Service on the St. Louis San Francisco Railway Company and the St. Louis San Francisco and Texas Railway Company.

Dear Sirs and Brothers:

The full General Committee was convened at Springfield, Mo., December 17, 1945 for the purpose of approving or disapproving the spreading of a ballot on the property for the purpose of enforcing cancellation of the agreement signed March 25, 1939, effective April 16, 1939, and other claims and cases unsettled on the property. Your Committee voted 100 percent in favor of spreading such a ballot.

* * * * * * *

Duties of Local Chairmen.

* * * * * * *

5. Date set for strike will be agreed upon and you will be advised in sufficient time to prepare for the execution thereof.

Fraternally yours,

(s) C. O. CARNAHAN,
General Chairman, BofRT.

Approved:

(s) J. A. RASH,
Deputy President, BofRT.

Ballot

I, the undersigned have carefully read the foregoing statement and vote .....,
For or Against
withdrawal from the service unless a satisfactory settlement to the Chief Executive of our organization and the General Chairman can be obtained; and I hereby appoint the herein named officers and/or their representatives as my attorneys-in-fact, and authorize them to settle the disputes set forth in the statement attached for me and in my name and in whatever manner to them seems proper.

I understand that in the event of such withdrawal from the service, it will be conducted in accordance with the laws of the organization.

Signature ..... Occupation .....

Member of BofRT ..... or Other Organization .....

Non-Member .....

Q. (By Mr. Stewart) Following that, Mr. King, did you receive a communication from C. O. Carnahan, General Chairman of the B. of R. T., Frisco Lines, respecting the calling of a strike or setting a date for a strike on the lines of the Frisco? A. Yes, sir.

(A letter, handed to the reporter, was marked for identification as "Carriers' Exhibit D, 10/15/46—OP".)

Q. I hand you a document identified as Carriers' Exhibit D and ask you if that is a true copy of the letter you received from Mr. Carnahan.

A. This is a copy of a letter which I received, January 3, 1946.

Q. That is the same Mr. Carnahan who is a defendant in this case? A. It is.

Mr. Stewart: I offer this exhibit in evidence, if Your Honor please, and I desire to read it. (Reading):

Carriers' Exhibit D.

"Brotherhood of Railroad Trainmen.

Springfield, Missouri,
January 3, 1946.

Mr. C. P. King,
Ass't to Chief Operating Officer,
Frisco Railway,
Frisco Building,
St. Louis 1, Missouri.

Dear Sir:

You are hereby notified that a strike of yard and road service employees under the jurisdiction of the Brother-

hood of Railroad Trainmen will be effective 6:00 P. M. Sunday, January 6, 1946.

Please acknowledge receipt.

Yours truly,
(Signed) C. O. CARNAHAN,
General Chairman, BofRT,
Frisco Lines.

Approved:
(Signed) J. A. RASH,
Deputy President, BofRT."

Mr. Stewart: Mr. King, following the receipt by you of information of the spreading of a strike ballot by the B. of R. T. and receipt of this letter from Mr. Carnahan to which you have just referred, what did you do with respect to anything, if anything, with respect to communicating that information to any government agency?

A. We contacted the National Mediation Board in Washington, D. C. and our trustee, Mr. Thompson, also sent a wire to the President, Mr. Truman.

Q. You say "we", whom do you mean by that?

A. The wire that was sent to Mr. Cole was by Mr. H. L. Worman, chief operating officer.

Q. Who is Mr. Cole?

A. Mr. Cole is secretary of the National Mediation Board.

Q. Was that information communicated through the secretary of the National Mediation Board by telegram and also by letter?

A. Yes, we communicated the information to him by telegram and by letter.

(A document handed to the reporter was marked for identification as "Carriers' Exhibit E, 10/15/46—OP".)

Q. I hand you Carriers' Exhibit E, which purports to be a copy of a Western Union telegram, addressed to H. L. Worman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, signed by Robert F. Cole, Secretary, National Mediation Board, dated January 5,

1946, and ask you if that is a correct copy of the telegram you or your office received from Mr. Cole?

A. That is a correct copy of a wire we received.

Mr. Stewart: I desire to offer this exhibit in evidence, if your Honor please, and I wish to read it. It is a Western Union Telegram, dated January 5, 1946, Washington D. C. 5, 1134A.

Carriers' Exhibit E.

"H. L. Worman, Chief Opr. Off.—
St. Louis-San Francisco Railway Co. St. L.—

The President has this date issued an Executive Order creating an Emergency Board of three members whose names will be subsequently announced from the White House to investigate the disputes on the St. Louis-San Francisco Railway Company and the St. Louis-San Francisco and Texas Railway Company with certain of their employes represented by the Brotherhood of Railroad Trainmen. Your attention is called to provisions of Section Ten, Railway Labor Act amended particularly to last paragraph thereof. Please acknowledge receipt of this message. Joint to Worman and Whitney.

ROBERT F. COLE, Secretary,
National Mediation Board.

Q. (By Mr. Stewart) Now, Mr. King, following that, did the Emergency Board, created by the President's Executive Order, convene in St. Louis? A. They did.

Q. On what date? A. January 11, 1946.

Q. And continued in session how long?

A. Public hearings were held commencing on January 11, 1946, and each day thereafter, Sunday excepted, and concluded on January 18, 1946.

Q. Where were those meetings or hearings held?

A. In the Room 516, U. S. Court and Custom House, St. Louis, Missouri.

Q. That is this building where we are present?

A. That is this building.

Q. Do you know the names of the members of that Board?

A. Yes, sir; Mr. Henri A. Burque—that is spelled (spelling) H-e-n-r-i A. B-u-r-q-u-e—Mr. Luther W. Youngdahl, Mr. Robert G. Simmons.

Q. Do you know whether they held any judicial office or offices?

A. Yes, sir, Mr. Burque was a judge of the Supreme Court of New Hampshire; Mr. Youngdahl, Supreme Court of Minnesota; Mr. Simmons, Chief Justice, Supreme Court of Nebraska.

Q. Did you attend the hearings held by that Board?

A. I did.

Q. Present at each meeting, each hearing? A. Yes, sir.

Q. Do you know whether or not the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, sought to intervene in that proceeding on behalf of the train porters and chair car porters employed on the Frisco?

A. Yes, they sought to intervene.

(A document, handed to the reporter, was marked for identification as "Carriers' Exhibit F, 10/15/46, OP".)

Mr. Stewart: I have here a certified copy of that.

Mr. Packman: We don't challenge its verity.

Mr. Stewart: If the Court please, I desire to offer in evidence Carriers' Exhibit F, which is a motion for leave to intervene in the proceeding before the Emergency Board, together with the proposed intervening petition. The motion reads as follows:

Carriers' Exhibit F.

"Before the Emergency Board Appointed by the President of the United States of America.

Appointed January 1946, Under Section 10 of The Railway Labor Act.

Brotherhood of Railroad Trainmen,
Complainant,

vs.

St. Louis-San Francisco Railway Company, St. Louis-San Francisco & Texas Railway Company,
Respondents.

Docket No.....

Application for Permission to Intervene in the Above Entitled Action.

Now come the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated and ask that they be permitted to intervene in the above entitled action and file the annexed intervening petition for reasons therein stated.

Sgd.) VERNON C. COFFEY,
General Attorney for the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated."

Mr. Stewart: Attached to that motion is a proposed intervening petition which I will not read. I offer that exhibit, consisting of both the motion and intervening petition in evidence.

The Court: Received in evidence.

(Which said Carriers' Exhibit F, so offered in evidence, having been previously duly marked for identification, is in words and figures as follows:)

Carriers' Exhibit F. (Continued).

Before the Emergency Board Appointed by the President of the United States of America.

Appointed January 1946, Under Section 10 of The Railway Labor Act.

Brotherhood of Railroad Trainmen,
Complainant,

vs.

St. Louis-San Francisco Railway Company, St. Louis-San Francisco & Texas Railway Company,
Respondents.

} Docket No.....

Intervening Petition of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated.

Now come the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, and state:

1.

That the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated was formed for benevolent, protective and beneficial purposes under the name of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, the object of which is to unite employees in train service, known as trainmen, brakemen, switchmen, firemen, train porters, and chair car porters, into an association for benevolent, protective and safety purposes, to hold and encourage scientific and educational lectures for the promotion of efficiency, safety and intelligence among its members; to advance the moral, social and educational privileges of its members; and said organization, among other things has members on the respondent Railroads, named in the above complaint, in the capacity of brakemen, flagmen, switchmen and train por-

ters, performing the duties of brakemen and flagmen. That it is duly authorized to transact business in all states in the United States and in the state of Missouri; that it is a corporation organized under the laws of the State of Delaware and the state of Kansas, not for profit but for benevolent and protective purposes and the mutual benefit of its members.

2.

Further, the Brotherhood of Railroad Trainmen, Complainant in the above entitled action spread a strike ballot listing twelve cases, one of which was case No. 3, the substance of case No. 3 reading as follows:—

"Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the StL-SF Railway Company and StL-SF&T Railway Company, and claim that additional brakemen covered by and paid under the respective Brakemen Agreement should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained."

3.

The cause of action herein stated arises under the Constitution of the United States, particularly Article 1, Section 8 thereof, which vests in the Congress of the United States jurisdiction "regulate commerce * * * among the several states * * *." and Article 1, of amendments to the Constitution of the United States, providing Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances, * * * and the preamble to the Constitution of the United States, which provides, that, to "promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity." That said corporation has some of its members in the employ of the respondent Railroad Companies in

the above entitled complaint; that granting of any relief sought as set out in paragraph 2 incorporated in this intervener's petition above, will necessarily affect these interveners and each of them and their members, many of whom are employees working on the respondent Railroads, and each of them, in the [state] of Kansas, Missouri, Oklahoma, Texas, Arkansas, Tennessee, Mississippi, Alabama and Florida; that said members of this corporation are denied membership in this complainant's Brotherhood the Brotherhood of Railroad Trainmen; that said members of this corporation are not allowed by said complainant Brotherhood to be members of it, and said Brotherhood in no manner represent these interveners or the said members of this intervening corporation.

That any relief, order given by this Emergency Board which would change the rules and regulations now existing on respondent Railroad whereby these interveners would not be recognized would result in depriving the members of this organization employment, and would be in violation of contract relation existing between respondent and your interveners.

4.

Your interveners further state that the rules and regulations, purpose and intendment of the complainant organization are in spirit, purpose and intent counter to the Fourteenth Amendment to the Constitution of the United States in that while the complainant organization is composed of men engaged in train service identical with the employment of your interveners, your interveners are, on account of their race, discriminated against by the complainant organization and are denied membership therein; and an order made by this Honorable Board recognizing and furthering the demands and desires of the complainant organization would be a discrimination against your interveners and would be in violation of the Fourteenth Amendment to the Constitution of the United States and would deny to your interveners the equal protection of the law, and would add an additional burden on interstate commerce.

Furthermore, the complainant has contracts with the respondent Railroad Companies, which contracts, if relief is granted according to the prayer of the complaint filed herein, additional men are required to be employed by the order of this Board, would require such additional men to be selected from the complainant's membership, thereby unlawfully and arbitrarily discriminating against members of this intervening organization in violation of the Fourteenth Amendment to the Constitution of the United States.

5.

These interveners further allege that while they are not commonly designated as flagmen or brakemen by the respondent Railroads in whose employment they are engaged, they are nevertheless, as a preliminary to their employment, required to and do make a study of railroad rules and practices, and become skilled in the same manner and to the same extent as white employes of the respondent railroads who are designated as flagmen and brakemen, yet these interveners allege upon information and belief that one of the purposes of the complainant herein, The Brotherhood of Railroad Trainmen, in filing this application, is to obtain an order from this Board that will authorize the employment in train service of only white brakemen and flagmen, who are members of the complainant's Brotherhood, and thereby bar on account of their color and their failure to hold membership in the complainant's Brotherhood the members of this intervening organization in train service on the Railroad lines of the respondents.

Wherefore, Your interveners pray that this Honorable Board hold and decree that any and all contracts existing between the complainant and the respondents requiring only members of the complainant's organization to be employed in train service, be held and decreed to be null and void until and unless such contracts are modified and amended to permit members of your intervening organization to be employed in all branches of the train service filled by members of the complainant organization, without discrimination, and that any orders that may be en-

tered herein shall preserve and protect all existing rights of the members of these intervening petitioners as employees of the respondent Railroad Companies; and further pray that this Board if it make any order, shall compel the said respondents to give to these interveners, all the rights, privileges and advantages, irrespective of the race or color, now enjoyed by the complainant herein irrespective of the fact that these interveners are not permitted to become members of complainant's organization, and for such further and equitable relief they may be entitled to.

(Sgd.) VERNON C. COFFEY,
Attorney for Interveners.

I, ..., of lawful age after being first duly sworn on Oath deposes and says that I am one of the Officers of the Intervening Respondents to make application to intervene in the above entitled cause of action; that I have read over the complaint and know the contents therein contained; and each and every averment is true as I verily believe.

(Sgd.) OSCAR N. JOHNSON.

Subscribed and Sworn to before me this 11th day of January, A. D., 1946.

(Sgd.) VERNON C. COFFEY,
Notary Public.

My commission expires, March 16, 1946.

Q. (By Mr. Stewart) Mr. King, do you know what action was taken by the Emergency Board on that motion to intervene?

A. The Board declined to permit them to intervene.

(A document, handed to the reporter, was marked for identification as "Carriers' Exhibit G, 10/15/46—OP.")

Mr. Stewart: If the Court please, I now offer in evidence Carriers' Exhibit G, which is a motion of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen,

Firemen and Railway Employees, Incorporated to reconsider its motion to intervene in the above action, in this proceeding before the Emergency Board appointed by the President, being the case of the Brotherhood of Railroad Trainmen against the Frisco, et al. That is a motion to reconsider.

The Court: Received in evidence.

(Which said Carriers' Exhibit G, so offered in evidence, having been previously duly marked for identification, is in words and figures as follows:)

Carriers' Exhibit G.

(Omitting caption)

"Motion of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway [Employers], Incorporated to Reconsider Its Motion to Intervene in the Above Entitled Action.

Come now the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, and would show to this Honorable Emergency Board appointed by the President of the United States of America, pursuant to Section 10, of the Railway Labor Act (U. S. Code, Title 45, Chapter 8) in the matter of the Brotherhood of Railroad Trainmen, Complainant versus St. Louis-San Francisco Railway Company, and St. Louis-San Francisco and Texas Railway Company, Respondents and request this Honorable Board to reconsider its decision of January 12th, 1946, denying this intervening labor organization the right to intervene for the following reasons, to-wit:

1. Your [petitions] are members of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated; and are employees of the St. Louis-San Francisco Railway Company and St. Louis-San Francisco and Texas Railway Company; that they are all members of the colored or Negro race by no fault of their own, but, by the reason that they were born colored men and so classed as such by white citizens of

these United States of America, yet they are citizens by reason of Section 1, of the Amendments to the Constitution of the United States of America—which reads as follows, to wit:—Quote;—

Article XIV. Section 1, of the Amendments to the Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. That if your [petitions] the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, are not given the privilege to [interven] in the above entitled action, the said interveners will be denied the equal protection of the laws * * * especially the Fourteenth Amendment to the Constitution of the United States of America, because that, the Brotherhood of Railroad Trainmen is the Statutory representative of the craft of employees your [petitioner] rightfully belong to on account of the class of work they have been engaged in for more than sixty years, and this work and the right to do this work was so recognized to belong to these colored train employees by W. G. McAdoo, Director General of Railroads under Government control of the properties now being operated by the [respondents] railway lines involved in the above entitled action above, during the United States Railroad Administration 1918-1919; and that the Negro train employees of this intervening labor union was paid the very same rate of pay paid to members of this complainant Brotherhood of Railroad Trainmen during the time the properties of the respondent railroad lines were operated by and under the jurisdiction of the United States Railroad Administration, and they are now so recognized as qualified train employees and capable to perform their duties that they per-

formed during Government control of the properties of the respondent railroad lines involved in the above entitled action.

3. That case No. 3, which appears in the Complainant's strike vote do affect the members of this intervening organization, because if the respondent railroad lines, in the above entitled action are required to add additional brakemen to perform the duties now performed by the Negro "Train Porters" the Negro "Train Porters" will lose their employment with the respondents on account of an unnecessary increase in the expense of the operation of the respondent's passenger trains on all of the respondent lines of this respondent in the above entitled action.

4. That the Constitution and by-laws of the Brotherhood of Railroad Trainmen provides at line No. 29 to 41, page No. 156, that Quote:—

'29 The applicant shall be a white male, sober, industrious,
and must join
30 of his own free will. He
31 must be less than eighteen and not to exceed
32 thirty-five years for Class F and G, forty years
33 for Class E, and forty-five years of age for class
34 A, B, C, D, N and O, on the day he is ad-
35 mitted in the lodge. He must be examined by the
36 medical examiner of the lodge, as provided in
37 Section 38 and 60. The Loss of two fingers or
38 the loss of one finger and thumb from one hand,
39 or the loss of the toes of one foot shall not dis-
40 qualify him for beneficiary membership, if he is
41 otherwise able to meet the physical requirements.

That your petitioners on account of their race and being members of the Negro race are ineligible for membership in this complainant's Brotherhood by reason of this complainant's by laws and Constitution.

5. That the officers of the Brotherhood of Railroad Trainmen has refused and still refuses to permit Negro Train employees members of this intervening organization to become members of the complainant's Brotherhood or represent this class of employees performing the identical

duties performed by members of this complainant Brotherhood upon the properties of the respondent Railway lines of the respondent railway named in the above entitled action, even though the Supreme Court of the United States have said in Steelve v. Louisville & N. R. Co., et al. No. 45, Argued Nov. 14, 15, 1944, Decided Dec. 18, 1944: Quoting from Supreme Court Reporter—National Reporter System dated January 1, 1945;

'4' Master and Servant. 15 (4)

The Railway Labor Act requiring carriers to [bargin] with representatives of Employees chosen as therein prescribed excluded any one else from representing a craft and deprives the minority members of a craft of the right which they would otherwise possess to choose a representative of their own, and its members cannot bargain individually on behalf of themselves concerning matters which are properly the subject of collective bargaining. Railway Labor Act Pargh. 2, subd. 2, U. S. C. A. Pargh. 152, subd. 2.

"5" Master and Servant 15 (4)

A labor organization chosen as the representative of a craft or class of employees is chosen to represent all the members of such craft or class regardless of their union affiliations or want of them. Railway Labor Act Pargh 1 subd. 6, pargh 2, subds, pargh 152, subds. 2, 3, 4, 6, 7, 9.

'8' Master and Servant 15 (4)

When a craft or class has designated its representative under the Railway Labor Act, such representative is responsible under the law to act for all members within the craft, or class, those who are not members of the represented organization, as well as those who are members. Railway Labor Act pargh 1, subd. 6, pargh 2, subds. 2, 3, 4, 6, 7, 9, 45 U. S. C. A. pargh 151, subd. 6, pargh 152, subds. 2, 3, 4, 6, 7, 9.

'9' Master and Servant 15 (4)

Under the Railway Labor Act the organization chosen to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represent. Railway Labor Act pargh 1, subd. 6, pargh

2, subds 2, 3, 4, 6, 7, 9, 45 U. S. C. A. pargh 151, subd. 6, pargh 152, subds. 2, 3, 4, 6, 7, 9.

'13' Master and Servant 15 (*) (23)

A bargaining representative under the Railway Labor Act is without power to discriminate against members of a craft or class represented on the rounds of race. Railway Labor Act pargh 1, subd. 6, pargh 2, subds. 2, 3, 4, 6, 7, 9, 45 U. S. C. A. pargh 151, subd. 6, pargh 152, subds. 2, 3, 4, 6, 7, 9.

A trade union chosen as bargaining representative under Railway Labor Act which discriminates on the ground of race against members of a craft or class represented by it, irrespective of whether they are members of the Union, may be enjoined from taking the benefit of such discriminatory action, and the railroad is not bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by statute from making. Railway Labor Act pargh 1, subd. 6, pargh 2, subds. 2, 3, 4, 6, 9, 45 U. S. C. A. pargh 151, subd. 6, pargh 152, subds. 2, 3, 4, 6, 7, 9.

'16 Master and Servant 15 (4)

A labor union assuming to act as the statutory representative of a craft must represent nonunion or minority union members of the craft without hostile discrimination fairly impartially and in good faith, and wherever necessary to that end the union must consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and give them notice of and opportunity for hearing on its proposed action. Railway Labor Act pargh 1, subds. 2, 3, 4, 6, 7, 9, 45 U. S. C. A. pargh 151, subd. 6, pargh 152, subds. 2, 3, 4, 6, 7, 9.

6. The [petitions] your interveners would show that under the Railway Labor Act the statutory representative of the craft and class of employees who hold the contracts on the properties of the respondent railroad lines involved in the above entitled action, is not entitled to the benefits of its discriminatory action and relief sought in Case No. 3, set out in complainant's strike ballot.

7. Wherefore Your, interveners pray that they be heard that your Honorable Board may obtain a full and complete statement of the facts involved in all matters raised in Case No. 3, and now before this Honorable Board for consideration; and further pray that this Board if it make any recommendation upon its findings, shall not prejudice the Negro train employees members of this intervening labor union, and for such further and equitable relief they may be entitled to.

VERNON C. COFFEY,
HENRY D. ESPY,
Attorneys for Interveners,
Brotherhood of Trainmen, Brakemen,
Porters, Switchmen, Firemen &
Railway Employees, Incorporated.

Q. (By Mr. Stewart) Do you know what was done to that motion to reconsider, what action was taken on it, Mr. King? A. It was denied.

(A document, handed to the reporter, was marked for identification as "Carriers' Exhibit H, 10/15/46, OP".)

Q. Subsequent to January 18, 1946, did you receive from any source a copy of the report made by the Emergency Board to the President in this controversy between the Brotherhood of Railroad Trainmen and the Frisco?

A. Yes, sir.

Q. From whom did you receive that?

A. Mr. Robert F. Cole, Secretary, National Mediation Board.

Mr. Stewart: If your Honor, please, I have here a copy of that report marked "Carriers' Exhibit H". It deals with the twelve cases listed on the Strike Ballot, and were heard by the Board. I desire to introduce this report in evidence, but I wish to read only certain parts of the report which relate to this controversy involving the train porters.

Mr. Packman: Pardon, your reference to "this controversy" is not the controversy in Court today but Case No. 3?

Mr. Stewart: Yes.

Mr. Packman: I just wanted to make sure.

Mr. Stewart: No, I don't mean this controversy. I said the controversy between the Brotherhood of Railroad Trainmen and the railroad.

The Court: The whole exhibit is in evidence, as I understand it?

Mr. Stewart: The whole exhibit is in evidence. I am offering the whole thing in evidence, but I simply wish to read a part of it to your Honor.

The Court: All right.

Mr. Stewart: (Reading)

Carriers' Exhibit H.

St. Louis, Mo.
January 24, 1946.

The President,
The White House.

Dear Mr. President:

The Emergency Board created by you on January 5, 1946, under Section 10 of the Railway Labor Act, to investigate and report to you respecting certain disputes existing between the St. Louis-San Francisco Railway Company and the St. Louis, San Francisco and Texas Railway Company and certain of their employees represented by the Brotherhood of Railroad Trainmen, has the honor to submit herewith its report based upon its investigation.

Respectfully submitted,
HENRI A. BURQUE
LUTHER W. YOUNGDAHL
ROBERT G. SIMMONS, Chairman.

Report to the President by the Emergency Board Created January 5, 1946 Pursuant to Section 10 of the Railway Labor Act.

In re: Brotherhood of Railroad Trainmen
and
St. Louis-San Francisco Railway Company and
St. Louis, San Francisco and Texas Railway Co.

The President of the United States, Harry S. Truman, was notified by the National Mediation Board that disputes existed between the St. Louis-San Francisco Railway Company and the St. Louis, San Francisco and Texas Railway Company and certain of their employees represented by the Brotherhood of Railroad Trainmen; that the disputes had not been adjusted under the provisions of the Railway Labor Act; and that in the judgment of the National Mediation Board, those disputes threatened to interrupt interstate commerce substantially within the states of Missouri, Kansas, Oklahoma, Arkansas, Tennessee, Texas, Mississippi, Alabama and Florida, to a degree such as to deprive that portion of the country of essential transportation service.

On January 5, 1946, the President, by executive order and by virtue of the authority vested in him by Section 10 of the Railway Labor Act, as amended, created a board of three members to investigate said disputes and to report its findings to him. The President appointed as members of said Board, Robert G. Simmons of Lincoln, Nebraska, Henri A. Burque of Nashua, New Hampshire, and Luther W. Youngdahl of St. Paul, Minnesota.

Pursuant to said executive order and the letters of appointment, all members of the Board met in Room 516, U. S. Court and Custom House, St. Louis, Missouri on January 11, 1946. It selected Robert G. Simmons as Chairman and approved the appointment of Frank M. William & Co. as official reporters.

Appearances on behalf of the carriers were made by Alvin J. Baumann, M. G. Roberts and O. P. King. Appearances on behalf of the Brotherhood of Railroad Trainmen were made by J. A. Rash, Deputy President, and C. O. Carnahan, General Chairman, St. Louis System.

Public hearings were held commencing on January 11, 1946 and each day thereafter, Sunday excepted, and concluding on January 18, 1946. The record of the proceedings, consisting of 7 volumes of 912 pages and numerous exhibits, are transmitted with this report.

Under date of December 21, 1945, the Brotherhood of Railroad Trainmen circulated a strike ballot among the employees represented by it, containing twelve cases which the ballot recited remained unadjusted and in dispute. The vote on the strike ballot was a favorable one. The official ballot, the statement of cases in dispute and a tabulation of the result appears in Volume 7 of our hearings, at the close thereof, being Trainmen's Exhibits 37 and 38.

Evidence and argument were submitted by the parties. A report upon each item severally follows, reciting the nature of the claim as set out in the strike ballot, and our conclusions as to the matter so submitted.

There is some discrepany between the cases listed on the strike ballot and those described in the various statements of claims presented at the hearings. We are listing the cases verbatim as they appear on the strike ballot.

For convenience and brevity the St. Louis-San Francisco Railway Company and the St. Louis, San Francisco and Texas Railway Company will be hereinafter referred to as Carrier, the Brotherhood of Railroad Trainmen as Brotherhood, and the National Railroad Adjustment Board as Adjustment Board."

Mr. Stewart: I am going to omit all of this report which relates to eleven cases and simply read that which relates to Case No. 3, being the—

"Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co. and claim that additional brakemen covered by and paid under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained."

"The Brotherhood"—that is the Brotherhood of Railroad Trainmen—"here challenges the right of the Carrier to use train porters on certain of its passenger trains to perform the duties ordinarily performed by brakemen, the contention being that it holds a contract providing that such services shall be performed by men of the class or craft of brakemen, and that the Carrier is violating that contract. The claim has not been submitted to the Adjustment Board.

"During the progress of the hearings, the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees Incorporated presented a petition asking that it be permitted to intervene. Its petition contended, in effect, that it held a contract with the Carrier whereby members of the craft or class of porters had a contractual right to perform the work here in dispute, and that any findings made by us might adversely affect their contractual rights. It asked leave to present evidence and argument and sought a determination of the rights of its members under its contract. This organization was not a party to the dispute that resulted in the emergency causing the President to create this Board. We were of the opinion that we did not have authority to investigate and report on the contentions it advanced. Accordingly, we denied its petition to intervene.

"The Carrier contends that for at least the last 40 years, it has employed and used porters on certain of its trains, to perform work here in dispute. The Carrier further asserts that the contract of March 15, 1920, upon which the complaint is based, does not directly prohibit such continued use of porters. On March 14, 1928, this Brotherhood, and other train service organizations entered into a contract with the Carrier whereby it was agreed that 'in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed.'

"The Carrier now contends that it has the right to continue the use of porters in the duties now performed based upon long practice, acquiescence in and implied approval by the Brotherhood as evidenced by the contracts men-

tioned. The Brotherhood in its submission presents certain provisions of the contract between the Carrier and the Porters' organization. It thus presents the two contracts for construction. The Carrier has offered the entire contract in evidence. (Carrier's Exhibit 44) The Trainmen's Schedule is in evidence as Carrier's Exhibit 4.

"The issue thus presented is this: Does the Brotherhood have the right to have this work performed exclusively by men of the craft or class represented by it, or may the Carrier properly continue to have that work performed by men of the craft or class represented by the Porters' organization?

"The Supreme Court of the United States has recently been presented with a similar problem. See Orders of Railway Conductors vs. Trustees of Central Railroad Company of New Jersey, No. 37—October Term, 1945, decided January 14, 1946. There, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen each claimed that its respective agreements entitled it to supply certain of the employees for certain trains of the Carrier. There a practice over a period of years was shown, whereby Order of Railway Conductors' members performed the work which the Brotherhood of Railroad Trainmen claimed belonged to members of its organization. A dispute arose. The Carrier agreed to substitute Brotherhood of Railroad Trainmen's members for Order of Railroad Conductors' members on the work involved. The Order of Railroad Conductors asked that the carrier be enjoined from taking such action so long as its contracts were not altered in accordance with the provisions of the Railway Labor Act. The case was referred to a master who found that the Order of Railroad Conductors' contract did not provide that its men should do the disputed work. The District Court denied the Order of Railroad Conductors the relief asked. The Circuit Court of Appeals held that the petition should be dismissed on jurisdictional grounds. The Supreme Court held that a question of interpretation of the contracts of the two Brotherhoods was presented. It then held that Congress had specifically provided a tribunal to interpret such contracts in order to settle such a dispute, and referred to the Adjustment Board as a designated

'agency peculiarly competent to handle the basic question' involved.

"The Supreme Court in the course of the opinion said that 'interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position . . .. For ORC's agreements with the railroad must be read in the light of others between the railroad and BRT. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances, the Court should exercise equitable discretion to give that agency the first opportunity to pass on the issue.'' The Supreme Court then held that the trial Court 'should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad' and left open to the parties the 'opportunity for application to the Adjustment Board for an interpretation of the agreements.'

"The similarity of the basic factual situation and issues in the Central Railroad case and the issue presented to this Board are apparent. The reasoning of the Court, in refusing presently to determine the question and in suggesting to the parties that their remedy lies in proceeding under the Railway Labor Act and before its agencies, is clearly applicable here. Accordingly, we do not undertake to make findings of fact or recommendation here, save to suggest that the parties have available to them an administrative tribunal created by the Congress to determine the dispute here presented. They have not availed themselves of the remedy. It is clearly the intent and purpose of the Railway Labor Act that disputes of this character be determined there."

Mr. Stewart: Then where it concludes:

"Conclusion.

"It will be noted with reference to Cases 2 to 12 inclusive, two of them are docketed and awaiting hearing before the

Adjustment Board, and a number of the others are in process of preparation for submission to the Board. Some of these latter claims are of recent origin. All of these cases should be processed for submission to the Adjustment Board unless settled on the property. We have heard considerable evidence, indicating that there is a sharp dispute between the Carrier and the Brotherhood, both on questions of fact, as well as questions of interpretation of the agreements in each of the cases presented. Under the Railway Labor Act, it was not intended that Emergency Boards should perform the functions of the Adjustment Board in the hearing of claims of this character. Adequate machinery has been set up under the Act for the hearing and disposition of these claims. At the most, our conclusions would be advisory, and we deem it inadvisable to make recommendations as to these claims, because of the possibility of prejudicing the parties in the hearing before the Adjustment Board.

"We agree with the statement made by the Emergency Board, dated June 13, 1945, in its report to the President in connection with the dispute between the River Terminal Railroad Company, and its employees represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen.

"We quote from page 11 of this report:

" 'Most of the cases included in the strike ballot and presented to this Board involve matters which, in our opinion, could have been presented to the First Division of the National Railroad Adjustment Board under the provisions of section 3 of the Railway Labor Act, as amended.

" 'Section 10 of that act, as its title and provisions clearly indicate, should be resorted to only in cases of emergency, after all of the intervening steps provided by the act have been taken.

" 'No employee organization should resort to the use of a strike ballot to create an emergency for the purpose of avoiding the necessity of taking these intervening steps. If this should become a practice, the general plan of handling railroad labor disputes at present would be gravely jeopardized.

"'The fact that there is a present delay in processing claims through the First Division of the Adjustment Board, does not justify the failure to file with that Division claims properly within its jurisdiction. Instead both parties should exert every effort to overcome such delay and to remedy the situation.

"'The Carriers and the Brotherhoods may justly feel proud of the successful operation of the method provided by the Railway Labor Act for the orderly settlement of their disputes. We feel sure that neither would now willingly tear down the successful operation of that plan, which they have spent years in perfecting. Stricter and more careful observance of the specific provisions of the act will tend to avoid this undesirable result. We strongly urge such observance.'"

The Board continues: "We believe this statement is pertinent to Cases 2 to 12 inclusive, presented here, and recommend, therefore, that all of these cases be processed for submission to the Adjustment Board, in the event they cannot be disposed of satisfactorily on the property."

Q. (By Mr. Stewart) Mr. King, aft the filing of the Emergency Board's Report to the Pre dent, were negotiations resumed between the Carriers and the Brotherhood of Railroad Trainmen with respect to the disputes enumerated in the strike ballot? A. Yes, they were.

Q. Where were those negotiations held?

A. The first negotiations after the Emergency Board's Report were in my office at St. Louis, beginning February 5, 1946.

Q. How long did those negotiations continue?

A. Well, they continued for two or three days—just a moment, February 5th to 8th, inclusive, and then later we had some conferences in Springfield, Missouri.

(A document, handed to the reporter, was marked for identification as "Carriers' Exhibit I, 10/15/46, OP".)

Q. I hand you Carriers' Exhibit I, being a copy of a letter dated "Springfield, Missouri, February 22, 1946," addressed to "Mr. C. P. King, Assistant to Chief Operating Officer, Frisco Railroad, St. Louis 1, Missouri," signed

"C. O. Carnahan, General Chairman, BRT, Frisco Lines." I ask you if that is a correct copy of the original letter you received from Mr. Carnahan?

A. Yes, that is a correct copy, and might I say here that prior to the conferences in Springfield, and subsequent to the ones February 5th to 8th, there were some further conferences in my office at St. Louis, February 18th and 19th.

Q. Were you confronted at any time during the course of those negotiations with a further strike threat by the B. of R. T.? A. Yes; we were.

Mr. Stewart: If your Honor please, I offer in evidence Carriers' Exhibit I.

The Court: Received in evidence.

Mr. Stewart: Being as follows, on letterhead of Brotherhood of Railroad Trainmen:

Carriers' Exhibit I.

"Springfield, Mo.
February 22, 1946

Mr. C. P. King
Asst. To Chief Operating Officer
Frisco Railroad
St. Louis 1, Missouri

Dear Sir:

Relative conferences held in your office in regard to twelve matters under dispute on this property which were included in the strike ballot taken some 60 days ago. In the conference of February 18th, you suggested arbitration as a means of disposing of six of the matters under dispute.

I am sorry that I am unable to agree to arbitration in settlement of these matters. In the hopes of settling the twelve matters under dispute peaceably, I submitted several compromise proposals which were [delcined]. Please accept this letter as a withdrawal of compromise proposals made by me and I request that they be disposed of as outlined on the strike ballot.

Several conferences have been held in regard to this matter under dispute, and we have been unable to reach a decision to satisfactorily dispose of them so that I feel

that further conferences would be a waste of effort and of no avail.

While you stated that your decision in regard to these matters was final, you also requested I inform you as to what disposition was to be made of them. Kindly be advised that I have requested authority from Chief Executive to set the withdrawal time for members of my organization from this property effective 6:00 P. M., February 26, 1946, and the men have been notified accordingly.

Yours very truly,

(s) C. O. CARNAHAN
General Chairman, BRT.
Frisco Lines.

Q. (By Mr. Stewart) Did you understand that to mean strike threat, Mr. King? A. Yes, sir.

Q. Now, subsequent to that time, were negotiations still continued looking to an adjustment of the dispute between the B. of R. T. and the Carriers? A. They were.

Q. Did you finally reach an agreement of settlement of all twelve of the disputes? A. We did.

(Copy of letter, handed to the reporter, was marked for identification as "Carriers' Exhibit J, 10/15/46, OP".)

Q. I hand you Carriers' Exhibit J, being a letter dated "Springfield, Missouri, March 7, 1946," addressed to "Mr. E. E. Oster, Vice-President, Brotherhood of Railroad Trainmen, Springfield, Missouri" and "Mr. C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, Springfield, Missouri", and signed by "C. P. King, Assistant to Chief Operating Officer, St. Louis-San Francisco Railway Company" and "C. P. King, Assistant to Vice-President, St. Louis, San Francisco and Texas Ry. Co.", and ask you if that is a correct copy of a letter addressed to those gentlemen outlining the terms of the settlement of these twelve disputes? A. It is.

Mr. Stewart: If the Court please, I desire to offer this exhibit in evidence.

The Court: Received in evidence.

Mr. Stewart: I shall read a portion of it which applies only to this train porters' case. The letterhead of:

Carriers' Exhibit J.

"St. Louis-San Francisco Railway Company, Debtor
Frank A. Thompson, Trustee
St. Louis, San Francisco and Texas Railway Company
Frank A. Thompson, President

At Springfield, Missouri
March 7, 1946

Mr. E. E. Oster, Vice-President,
Brotherhood of Railroad Trainmen,
Springfield, Mo.

Mr. C. O. Carnahan, General Chairman,
Brotherhood of Railroad Trainmen,
Springfield, Mo.

Gentlemen:

Confirming understanding reached in conference, it is agreed the 12 cases listed on your strike ballot of December 21, 1945, are disposed of as follows:"

—I will read only case No. 3.

"Case No. 3—Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2, 1945, where claims have been submitted to be paid."

"(signed) C. P. KING,
Assistant to Chief Operating Officer,
St. Louis-San Francisco Railway Company.

(signed) C. P. KING,
Assistant to Vice-President, St. Louis, San Francisco and Texas Ry. Co.

Approved for Brotherhood of Railroad Trainmen

By: (signed) E. E. OSTER,
Vice President.

By: (signed) C. O. CARNAHAN,
General Chairman."

Q. (By Mr. Stewart) Mr. King, following the letter of March 7th to the officers of the Brotherhood of Railroad Trainmen, did you advise the officers of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen and Firemen, Incorporated, being generally known as a train porters' organization, of that agreement that had been made with the Brotherhood of Railroad Trainmen with respect to the use of train porters to perform what was called brakemen's duties?

A. Yes, I so advised them in a letter dated March 9th, 1946.

(Copy of a letter, handed to the reporter, was marked for identification as "Carriers' Exhibit K, 10/15/46, OP.")

Q. I hand you Carriers' Exhibit K and ask you if that is a correct copy of the letter you addressed to the officers of the porters' organization? A. It is.

Mr. Stewart: If it please the Court, I offer this Exhibit K, Carriers' Exhibit K, in evidence.

The Court: It will be received.

Mr. Stewart: I desire to read it.

Carriers' Exhibit K.

"St. Louis 1, Missouri
March 9, 1946
File 3015-17

Mr. L. W. Fairchild,
General President, Train Porters,
1024 Alice St.,
Poplar Bluff, Mo.

Mr. Vernon C. Coffey,
Director-Gen. Attorney, Train Porters,
1518 N. 7th St.,
Kansas City, Kansas.

Mr. L. H. Hoyl,
General Chairman, Train Porters,
1840 Verona Road,
Kansas City, Mo.

Gentlemen:

We have agreed with the Brotherhood of Railroad Trainmen that effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued.

Under this agreement we will, effective April 1, 1946, discontinue all train porter positions. We will employ chair car porters on such trains as in our opinion their services are necessary or required.

Yours very truly,

(Signed) C. P. KING,
Assistant to
Chief Operating Officer."

Q. (By Mr. Stewart) Following that date of March 9, 1946, Mr. King, did you supplement that letter with another letter?

A. Yes, sir, I substituted it with another letter notifying them that it should also be understood that the same thing would apply on the St. Louis-San Francisco and Texas Railway.

(Copy of a letter, handed to the reporter, was marked for identification as "Carriers' Exhibit L, 10/15/46, OP.")

Q. I hand you Carriers' Exhibit L and ask you if that is a correct copy of the letter supplementing your letter of March 9th to the officers of the train porters organization? A. It is.

Mr. Stewart: I offer this Carriers' Exhibit L in evidence, if the Court please.

The Court: Received in evidence.

Carriers' Exhibit L.

St. Louis 1, Missouri
March 12, 1946
File 3015-17

Mr. L. W. Fairchild, Gen. President, Train Porters,
1024 Alice Street, Poplar Bluff, Mo.

Mr. Vernon C. Coffey, Director-Gen. Atty., Train Porters,
1518 N. 7th St., Kansas City, Kansas.

Mr. L. H. Hoyl, Gen. Chrmn., Train Porters,
1840 Verona Road, Kansas City, Mo.

Gentlemen:

My letter to you March 9th reading as follows:

"We have agreed with the Brotherhood of Railroad Trainmen that effective April 1, 1946 the practice of train porters performing work generally recognized as brakemen's duties will be discontinued.

"Under this agreement we will, effective April 1, 1946, discontinue all train porter positions. We will employ chair car porters on such trains as in our opinion their services are necessary or required."

You will please understand that this will apply on the St. Louis, San Francisco and Texas Railway as well as the St. Louis-San Francisco Railway.

Yours very truly,

C. P. KING,
Assistant to
Chief Operating Officer.

C. P. KING

resumed the stand and testified further as follows:

Direct Examination (Continued).

By Mr. Judge:

Q. Mr. King, in your negotiations over Case 3, was the situation stated to you that the National Railroad Adjustment Board had made some awards which should act as precedence in this case?

A. Yes, it was so stated by the representatives of the B. of R. T.

(Documents, handed to the reporter, were marked for identification as "Brotherhood's Exhibits 5, 6, 7 and 8, 10/15/46, OP", respectively.)

Q. Mr. King, I show you what has been marked 'Brotherhood's Exhibits 5, 6, 7 and 8, being awards of the National Rail-Road Adjustment Board, First Division, No. 4586, 5906, 5907, and 7251, and ask you if in general you are familiar with those awards?

A. I have seen them and am familiar in a general way with them.

Q. It was these awards that were referred to in the negotiations I just mentioned?

Mr. Packman: I object to that, Your Honor. It is leading. I think he should ask him whether there is any specific numbered award, and whether he saw them at that time.

Mr. Judge: Well, may I reframe my question? It was in general awards of this nature that were referred to?

Mr. Packman: If your Honor please, I object to that, they are not in evidence, and it is not—

Mr. Judge: They have been identified.

The Court: Objection overruled. We have been letting about everything in here.

Mr. Packman: Well, we are not responsible for their lapses, your Honor.

The Court: I understand that is true.

Q. (By Mr. Judge) You still have the exhibits, the group of exhibits you were using in your previous testimony? A. Yes, I think I have.

The Court: Some of them may be here. I am not sure.

Q. (By Mr. Judge) This one has not been offered. I refer you to a memorandum under date of August 3, 1918. This is Exhibit 4 in the group of exhibits here, from G. H. Schleyer, General Superintendent of the First District, and J. E. Hutchison, General Superintendent of the Second District, to Mr. J. M. Kurn, and ask you if you have the original of that in your files. A. Excuse me?

Q. Maybe I can facilitate this, Mr. Packman. All of these have been identified by Mr. King in his deposition and is it agreeable with you that this needs no further identification?

Mr. Packman: Yes, that is agreeable.

Mr. Judge: May it be marked, though, as Brotherhood's Exhibit 9?

Q. Mr. King, would you explain just how an employee of the railroad acquires his classification into a class of employment?

A. Well, he acquires it either by being employed directly into such classification or by being promoted or transferred to it after having entered service.

Q. When a man seeks employment with the railroad, does he make out an application for employment? A. Yes.

Q. Does he, in connection with that application, name the classification of employment which he seeks?

A. Yes, he generally does.

Q. Now, who sets up those various classifications? Who gives the actual name or title to that job?

A. The railroad.

Q. Now, from those applications, then, the railroad, I take it, approves and employs some and may reject some, as the case may be?

A. Yes, the applications are taken generally when there is an opening and if the employee is susceptible, he is taken into the service. If he is not, his application is rejected.

Q. When a man is accepted for employment, what is the

practice with respect to the placing of his name on the seniority list?

A. Well, it varies; under some of the agreements, seniority is acquired by an agreement between the railway and some organization representing groups of employees. Most of the agreements provide that seniority starts on the first day of actual service.

Q. Excepting for the moment, Mr. King, the crafts that are promotable, is it possible for an employee of your railroad to be on more than one seniority list?

A. Well, you said excepting for those who are promotable?

Q. I am referring now to promotions from, say, the craft of brakeman to conductor, fireman to engineer.

A. Well, there are some instances where they are on more than one roster. For instance, you may have a man who has seniority as a clerk and perhaps he is cut off from force reduction. His name is still on the roster; but such service is in the telegraphers group, the seniority there.

Q. If you subsequently employ clerks and you get to his name again, can he still remain on two seniority lists?

A. Generally, no. There are some exceptions.

Q. Generally, though, then he must make a choice, is that not true?

A. Yes, except where you take instances where they are promoted from one craft to another and there are several of those.

Q. Now, I was going to get to that, Mr. King. There are some crafts promotable to other crafts?

A. And still hold their seniority from the one they are promoted.

Q. Is if true of the brakeman and conductor craft?

A. Yes.

Q. Is that also true of firemen and engineers class?

A. It is.

Q. Could you state briefly how the seniority list works in those promotable crafts?

A. Speaking of brakemen and conductors, a man enters the service as brakeman. He is then eligible for promotion to conductor generally after a minimum of three years' service in seniority order provided he can pass the necessary examination on transportation rules and physical examination.

Q. Perhaps I can expedite this by showing you Brotherhood's Exhibit 1, which I believe is the seniority roster of the Birmingham District and ask you to state if that fairly represents the brakemen's and conductors' roster? I believe it is on the very first page there, is it not?

A. Yes, this is a seniority roster for men in train service on the Birmingham and Tupelo Subdivisions, including Amory Yard. It is representative of the rosters on other districts with one exception, that we have some men on this seniority roster designated as colored. This is in the territory we generally refer to as east of the Mississippi River. The other districts west of the Mississippi River, we do not have colored brakemen.

Q. Mr. King, has the craft or class of train porters ever been a promotable class?

Mr. Packman: If your Honor please, we object to the form of the question. It assumes a fact which is a crucial fact. May it be understood we are not by our silence acquiescing in that?

The Court: In view of the testimony in this case, I think it is easy for the Court to distinguish what counsel for Brotherhood means and what counsel for plaintiff means.

Mr. Packman: Just so there will be no inference drawn from our silence.

The Witness: Would you restate your question, please?

Q. (By Mr. Judge) I asked if the class or craft of train porters has ever been a promotable class?

A. There are no agreement rules specifying or providing for promotion to another craft as there are in the case of brakemen to conductors.

Q. Has that always been true so far as you know, Mr. King? A. Yes.

Q. How long has the Frisco Lines been making up seniority lists, if you know?

A. Well, if you are referring to all classes of employees, it varies. For, instance, we had no seniority roster for clerks, maintenance way men and several other crafts till long about 1918, 1919, while on the other hand, we have

had seniority lists for brakemen, conductors, telegraphers, for a long period of years.

Q. Could you estimate the number of years that you have had seniority rosters for brakemen, conductors?

A. Well, I would say it was approximately sixty years. That is more or less of a guess.

Q. Mr. King, is it a general practice for a member of a particular craft or class of employees to do work of another craft in the railroad industry, or I will limit that to the Frisco Lines?

A. Well, of course, again that varies with different crafts. In some instances there are disputes about whether certain persons in one craft can do work in another craft. An outstanding example of that is your telegraphers and clerks. Your telegraphers—practically all, at least—do more or less clerical work and there are some agreements that contain rules that permit under certain conditions doing work of other crafts. That is true of the shop crafts to a limited extent.

Q. Would it be true, in general, to state that the various crafts are quite jealous of the [perrogatives] of that class and frown on the doing of their work by any other class or craft? A. Generally, that is true.

Q. And that is without regard to whether it may be a brakeman or conductor or switchman, but in general that is true of all the crafts, is it not?

A. Of course, it is a little difficult to answer a question like that without going into the ramifications of the different kinds of work they do. For instance, there is not that fine line of demarcation between a conductor and brakeman.

Q. Well, you frequently have claims presented to you for handling, do you not, Mr. King, that involve the crossing over of craft lines by doing work by a member of one craft that another craft claims should belong to them?

A. Yes, we have some claims of that kind.

Q. Mr. King, I show you what has been marked Brotherhood's Exhibit 2 and ask you to state what that is.

A. This is an agreement between the St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company, and the Order of Railway Conductors and Brotherhood of Railroad Trainmen.

Q. Does that contract show in the rates of pay and the working conditions under which those two crafts work?

A. Yes, sir.

Q. How long has that contract been in effect?

A. This particular one, with amendments, has been in effect, so far as brakemen are concerned, since March 15, 1920, to date.

Q. There have been amendments from time to time?

A. Yes.

Q. Does that Trainmen's Schedule, as it is designated, cover the employment of train porters? A. No, sir.

Q. This covers only the class or craft of the brakemen and conductors as they are carried on your seniority rosters?

A. That is correct. I might say I don't think it has any particular bearing on this case, but in 1929 we made another agreement with the Order of Railway Conductors, and that agreement superseded the one of March 15, 1920, insofar as conductors are concerned.

Q. So as of this time, this Trainmen's Schedule applies only to brakemen? A. That is correct.

Q. I believe it has previously been testified to that the train porters are paid a different rate of pay?

A. That is correct.

Q. And that they have their own separate agreement with the railroad? A. Yes, sir.

Q. Mr. King, in the classification of employees, do you have any classification known as trainmen?

A. Well, sometimes men in different crafts are referred to under one set of circumstances one way and another set of circumstances some other way. Now, in the book of rules, they do use the word "trainmen", and it is defined in the book of rules. We frequently in referring to men in train service, brakemen, we refer to them as trainmen, but technically a brakeman is a brakeman regardless of what position on the crew he might happen to be working. A train porter is a train porter.

Q. Would you say the term "trainmen" is a general term referring to a member of the train crew?

A. Yes, it is more or less of a general term.

Q. It doesn't refer to his classification in your service?

A. No, except where it might be used in the book of rules and defined—

Q. (Interrupting) And there again it refers to the general term, does it not?

A. Yes, it is more or less of a general term. It is used on that schedule, I think, trainmen's schedule, for the reason that when the agreement was executed, it included both brakemen and conductors.

Q. Mr. King, there has been some reference made to Case 12 before the Emergency Board, which I believe is the case involving the question of whether freight or passenger crews should work troop trains? A. Yes, I recall.

Q. Is it not a fact that the crew of freight trains receive a higher rate of pay than crews of passenger trains?

A. Yes, they do. They receive a higher rate for the miles run.

Mr. Judge: That is all.

(Two copies of letters, handed to the reporter, were marked for identification as "Plaintiff's Exhibits 48 and 49, 10/15/46, OP", respectively.)

Cross-Examination

By Mr. Packman:

Q. Mr. King, I hand to you Carriers' Exhibit B-3. I direct your attention to Paragraph No. 4, on Page 2. Will you please read that out loud?

A (Reading)) "This agreement is signed without prejudice to the rights of plaintiff and others similarly situated, whose rights are described in case of Howard v. St. Louis-San Francisco Railroad Company pending before Judge Duncan in the United States District Court at St. Louis, Missouri."

Q. Who prepared the contracts which were presented to the porters for signature? Who prepared the physical form of them?

A. You mean any one particular agreement or all of them?

Q. Well, let's refer to B-1.

A. Agreements such as these are arrived at in conference. Sometimes we take provisions proposed by representatives of the employees and incorporate them into agreements; other times provisions prepared by representatives of the railway; sometimes in conferences we change them around

and agree on how they will be worded and they are written out and we sign them.

Q. Isn't it a fact that in every instance the railroad has prepared a typewritten form and submits it to the representatives of the men who are to be covered?

A. Not in every instance.

Q. Well, in connection with Exhibit B, who puts the caption on there, "Agreement between J. M. Kurn and Frank A. Thompson, Trustees, St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters"? Who segregated or dissected out of the caption of "The Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated," the classes which the agreement purports to cover?

A. Well, that is the name of the organization, as I recall it, when we were ready to execute this agreement, we agreed that that was the way it would be written and we wrote it out that way. And to who did the physical writing, I think perhaps I did and gave it to a stenographer to copy, but the name of the organization was put in there because that is the name of the organization.

Q. I think I haven't made myself clear. Who designated in the caption that it is an agreement between the debtor and train porters and chair car porters to be set up in the caption?

A. Well, I don't know that one designated any more than the other, just an agreement.

Q. But it is a fact that the railroad designated the job heading of train porters, isn't that so?

A. Well, they had always been known by that and there was no dispute as to what it was.

Q. Well, was it always during the war, the first war, when they were classified as passenger brakemen, these same men were later reclassified as train porters?

A. Well, there was that interval in there when they were carried as brakemen, but I think even then in speaking of them on the railroad, they usually called them train porters. So it has been the general practice ever since I have known anything about the railroad to refer to them as train porters.

Q. Would they still be the same men irrespective of what you called them?

A. Would they still be the same men? I suppose they would.

Q. Would the work they did still be the same irrespective of what you called them?

A. Well, I hardly know how to answer that question, but the fact that they were called train porters didn't change their work, if that is what you are getting at.

Q. Would it make any difference what church they belonged to if they were performing the functions of a train porter? A. None in the world.

Q. Or what organization they belonged to? A. No, sir.

Q. Or what union they belonged to? A. No, sir.

Q. Or which union they did not belong to? A. No.

Q. Then it is the function that makes the craft and not the man, isn't that so? A. I would say that is so.

Q. And not the label or nomenclature?

A. Oh, yes, you get started to calling a machinist a machinist and it is the work he does that makes him a machinist. I suppose if you started calling him something else—

Q. (Interrupting) Suppose we called him a mechanic. Would he be any less a machinist if he were doing the work of a machinist? A. I think not.

Q. I show you Plaintiff's Exhibit 48, rather, I am going to show you these in inverse order, Plaintiff's Exhibit 49 first, and I show you now Plaintiff's Exhibit 48. Are those copies from the files of the Frisco Railway? A. They are.

Q. Would you kindly tell the Court what Exhibit 49 is? Read it.

A. 49 is a letter dated October 27, 1936, addressed to Mr. F. H. Shaffer, General Manager, Frisco Lines, Springfield, Missouri.

(Reading):

Plaintiff's Exhibit 49.

"Dear Sir:

The situation with reference to the head brakemen on trains 1 and 2 is somewhat changed, due to you having inaugurated the policy of issuing free pillows to patrons. As a result of this service, you are having the head brakemen on trains mentioned, perform the service of putting

slips [——] pillows and distributing the pillows, then taking the slips off of the pillows and storing the naked pillow and slips in separate bags, which entails additional work—work for which they were previously compensated from the money they received, which was 25¢ per pillow. Of course, to the ones who are deadheading who are employees, charge is made for the pillows.

In view of this pillow money having been taken away from these men, and yet they are compelled to perform this service, there is justification in asking that they be properly compensated therefor, and I am requesting that they be paid $10.00 per month in addition, for performing this service.

Yours truly,

/S/ F. W. MOREY,
General Chairman BRT,
Frisco Lines."

Q. Was that letter answered? A. Yes, sir.

Q. That is covered by our next exhibit. Please read the exhibit. A. (Reading):

Plaintiff's Exhibit 48.

"Springfield, Mo., November 12, 1936.

1625-15

Mr. F. W. Morey,
General Chairman, BRT,
Springfield, Missouri.

Dear Sir:

Your letter October 27, about head brakemen on trains 1 and 2 handling pillows:

In view of the fact that these men are required to handle pillows which are furnished free to passengers by the Company, am agreeable to giving them an allowance of $10.00 per month effective November 1 with the distinct understanding that the allowance is for this specific purpose.

I trust in view of this allowance the men will exert themselves to make a success of the pillow proposition and take care of it in a way which will attract additional business.

Yours truly,
(Signed) F. H. SHAFFER,
C. P. K.
General Manager."

Q. Does that letter refer to white brakemen handling pillows? A. Yes, sir.

Q. Are there still white brakemen who handle pillows on the Frisco System?

A. During the war, we, in company with a number of other railroads, for obvious reasons, one of which was a health measure, discontinued furnishing free pillows for a while and the practice has just recently been inaugurated.

Q. Did you say "free pillows"? A. Yes.

Q. Go ahead.

A. That is free to revenue passengers without charge. Just recently the practice has been inaugurated and I couldn't say positively that the head brakeman on these trains are now handling pillows.

[——] Well, at the time the brakeman was handing out pillows, was he any less a brakeman? A. No, sir.

Q. If he had swept the car with a broom, would he have been any less a brakeman? A. No, he would not

Mr. Packman: That is all. We offer those exhibits formally in evidence, your Honor, No. 48 and 49.

The Court: They will be received.

Mr. Stewart: That is all, Mr. King.

(Witness excused.)

Mr. Stewart: Carriers have no further evidence, your Honor.

The Court: Do you have any other evidence?

Mr. Judge: Yes.

J. A. RASH,

being produced, sworn and examined in behalf of defendants, testified as follows:

Direct Examination:

By Mr. Judge:

Q. Will you state your name? A. J. A. Rash.

Q. Where do you reside, Mr. Rash?

A. My home is in Frankfort, Indiana.

Q. What is your occupation?

A. Deputy president, Brotherhood of Railroad Trainmen.

Q. As such, do you operate out of and receive instructions from the Brotherhood headquarters in Cleveland?

A. I do.

Q. What territorial limits, if any, are attached to your position? A. The entire United States.

Q. In general, just what are your duties?

A. Well, make contracts, adjusting grievances.

Q. Can you state, Mr. Rash, whether or not the class or craft of train porters is employed on any other railroads in the United States outside of the Frisco Lines?

A. Oh, yes, they are employed on many railroads.

Q. There are many railroads that do employ that class or craft? A. Yes, sir.

Q. Are there railroads that do not employ that class or craft? A. There are some, sir.

Q. Does the Brotherhood of Railroad Trainmen anywhere in the United States represent or purport to represent the class or craft of train porters? A. They do not.

Q. Mr. Rash, are you familiar with the constitution of the Brotherhood, particularly I have reference to that section limiting membership to white males? A. Yes, sir.

Q. Is there a ruling on that section at the present time?

A. Yes, sir.

Q. Would you state the substance of that ruling?

A. The section you refer to, I believe, is Section No. 120, and the ruling upon Section No. 120 provides that the provisions of that section do not apply in states where it would be in violation of a state law.

Q. Is it a fact, Mr. Rash, that there are state laws in connection with labor organizations where membership is limited by reason of race? A. Yes, there are some.

Q. Is it then the intent of this ruling that at least in those states that membership is not limited by reason of race? A. That is right, sir.

Q. How does a person become a member of the Brotherhood?

A. You have to be employed on the railroad in train service or yard service, and more recently in bus service, and then you have to be in that employ at least 30 days. Then, you make application to become a member of the Brotherhood of Railroad Trainmen. That application is submitted to the local lodge in your territory and it is reviewed by a [com-] committee appointed by the president of that lodge; the committee reports favorable or unfavorable. If the committee reports favorable, you are accepted, your application is forwarded to the Grand Lodge in Cleveland, and if approved you become a member of the Brotherhood.

Q. Mr. Rash, when the Brotherhood represents and has a contract for a particular craft, does the Brotherhood represent all members of that craft regardless of race?

A. Yes, sir.

Q. Does it in the handling of grievances for that craft handle grievances for all members of that craft regardless of race? A. We do.

Q. What is the attitude of the Brotherhood with respect to the members of one craft or class of employees doing the work of another craft?

A. It is our position that the employees of one craft should not perform the work of another craft.

Q. Does the Brotherhood of Railroad Trainmen represent the craft brakemen on a good many railroads in this country?

A. Yes, we represent brakemen on practically every railroad in the United States.

Q. Can you state any instances wherein brakemen in years past and for many years performed work which was claimed by another craft and which subsequently was abandoned by the members of the Brotherhood?

A. Yes, formerly we did quite a lot of work which at the present time is now the recognized work of another craft.

Q. Can you give any instances of that?

A. Well, yes, coupling air for one, now generally recognized as the work of car men.

Q. Had the car men claimed that work?

A. In most instances, sir, they have.

Q. And the brakemen, you say, formerly did that work?

A. Yes, sir.

Q. Over a number of years? A. Many years.

Q. Do they do that work now? A. Very isolated places.

Q. Are there other instances of the same nature, Mr. Rash?

A. Yes, such as closing car doors and getting the numbers of cars prior to leaving on your initial trip.

Q. Those were all formerly considered duties of brakemen? A. Yes, sir.

Q. And they are no longer considered duties of brakemen?

A. On most railroads, the brakemen are not required to do that any more.

Q. In the event of a brakeman's job or run opening up, how is the person selected who is to do that job?

A. That varies in certain instances. If it is an assigned job, the agreements usually provide that the jobs shall be bulletined and the senior man voting on it assigned.

Q. What do you mean by the "senior man"?

A. I mean the senior brakeman holding rights in that particular class of service.

Q. Would that man appear on a seniority roster?

A. He would appear on a trainman's—brakeman's seniority roster.

Q. And the oldest man in point of service appearing on that roster would have a right to that job? A. He would.

Q. If he wanted it? A. Yes, sir.

Mr. Judge: That is all.

Cross-Examination.

By Mr. Packman:

Q. Mr. Rash, do you have any Negro members?

A. We have none that I know of.

Q. Despite the fact that there is a ruling that it does not apply in states where the constitution restricting your membership to white men would be in violation of a state law you have no Negroes?

A. We have had no applications that I know of.

Q. Isn't it a fact that the local lodges have the privilege of blackballing individuals irrespective of the pretense that you admit Negroes in any state because you wouldn't entertain an application, isn't that so?

A. There was a time in the Brotherhood when we didn't entertain an application.

Q. And now do I understand you that in states where the state law says that your limitation to white membership is illegal that you would entertain an application?

A. That would have to be passed on by the President of the Brotherhood.

Q. Is Tennessee one of the states where there is a state law preventing your Brotherhood from enforcing its restriction that the membership is confined to white people?

A. I do not know, because it is not a part of my work.

Q. Do you know anything about Missouri or Oklahoma?

A. Very little about Missouri or Oklahoma either one.

Q. Do you have that ruling in reference to the by-laws being inapplicable in states where it is in violation of the state law?

A. It is contained in the constitution of the Brotherhood.

Q. Passed when?

A. The constitution I have is the 1939 constitution.

Q. Why do you call it a ruling?

A. Because it is a ruling made on a section of the constitution by the Brotherhood.

Q. Did some lawyer pass on it?

A. No, sir, the president of the Brotherhood passed on it.

Q. Was that because it was recognized it was against public policy in some states to restrict the membership of a statutory agent of a craft to just white people?

A. That is done because it is the policy of the Brotherhood of Railroad Trainmen to not have any rules which are in violation of state or federal laws.

Q. In other words, you were giving lip service to the laws?

Mr. Judge: I object to that as argumentative.

The Court: Yes, objection sustained.

Q. (By Mr. Packman) Has the spirit of the Brotherhood changed so that they actually wanted to accept Negroes when they introduced this ruling that didn't apply in the states where there was a state law?

Mr. Judge: I object to that as argumentative also, your Honor.

The Court: Well, so far as he knows, if he knows what the policy is. I don't know what difference it makes so far as this case is concerned.

Mr. Judge: Of course, he didn't ask about policy. He asked about spirit, which I think are probably two different things.

Mr. Packman: He is a deputy president.

The Court: I understand he is. What difference does it make fundamentally?

Mr. Packman: I think it does. It tends to show that the statutory representative has a continued policy of prejudice and hence that we cannot expect relief from this statutory representative.

The Court: The witness has testified that the Brotherhoods have a right to blackball anybody they want, black or white.

Mr. Packman: I agree with you, it is immaterial to this case whether Mr. Howard can join the Brotherhood, but it is material whether or not Negroes are excluded as evidence of their prejudice.

The Court: I think it is a question of representation. I don't think it has anything to do with this case, gentlemen.

Mr. Packman: I will pass on to something else.

Q. Are you aware of the agreement that was executed on March 14, 1928, by the four train service organizations and the Frisco Lines? A. I never read the agreement.

Q. Answer my question. Are you familiar with it?

A. Not entirely, sir.

Q. Are you aware that the substance of it is that no more Negroes would be hired for the train or engine service?

A. I have heard that that was what the agreement contained.

Q. No doubt about it in your mind, is there?

A. No, I don't believe there is any reasonable doubt, but what that is the meaning of the agreement.

Q. And you know that the Frisco Line has endeavored to faithfully observe that agreement?

A. I don't know that they have.

Q. Have you ever known of any complaints being registered against the Frisco Line for alleged violation of that agreement by your Brotherhood?

A. There has never been any such complaint referred to me.

Q. Suppose there is a dispute between a white brakeman, a member of the Brotherhood, and a Negro freight brakeman over working conditions, will the B. of R. T. represent the Negro brakeman against the White B. of R. T. brakeman on a Frisco Railroad in connection with the grievance?

A. That would depend, sir, upon whether or not the contract was being violated.

Q. Who is on your grievance committee?

A. We have many grievance committees.

Q. On the Frisco Line?

A. We have a general grievance committee on the Frisco Lines, which is constituted of 18 or 20 local chairmen and I don't know their names.

Q. Is that made up of members of the B. of R. T.?

A. Yes, sir.

Q. Are there any Negroes on that committee?

A. Not that I know of.

Q. Were any Negroes ever eligible to be on that committee? A. I could not say, sir, about that.

Q. You could say no nonmembers are ever made members of your grievance committee, are they?

A. Nonmembers?

Q. Of the B. of R. T.? A. That is right.

Q. So you can say no Negroes have ever been on the grievance committee?

A. I could not state with respect to Missouri, because I don't know what the state law of Missouri is with respect to the application of our Section 20.

Q. You say that at times that the B. of R. T. has given

up its contention that certain work belongs to the brakeman's class?

A. I say that we are not now performing the work which we were formerly required to perform, much of the work.

Q. Well, are you performing additional duties that in the past you did not perform as a brakeman, in view of the streamliners, by way of illustration?

A. As the service requirements on railroads demands or are changed, naturally, we have to perform service which is commensurate with that kind of service.

Q. Is handing out pillows a recognized part of the brakeman's craft?

A. There are railroads in the United States where brakemen pass out pillows.

Q. Aren't there railroads in the United States where brakemen are supposed to pick up bottles and keep the car clean if there are no porters?

A. I expect there are some where brakemen pick up bottles or newspapers.

Mr. Packman: That is all. Thank you.

(Witness excused.)

Mr. Judge: If the Court please, there were depositions taken in Washington, D. C. of Robert F. Cole, who is the Secretary of the National Mediation Board. These depositions were taken on behalf of the plaintiff. I assume that all the depositions and all parts of them will be offered in evidence and received in evidence. I desire to read just parts of this.

The Court: That has not been offered in evidence?

Mr. Judge: No, it has not.

Mr. Packman: Why don't you identify it as an exhibit? We might be saving it for rebuttal. We didn't know what would come up.

Mr. Judge: I was assuming all depositions, all parts of them—

Mr. Packman: (Interrupting) Sometimes they are grossly irrelevant. We didn't see why we should clutter up the record.

The Court: Unless they are offered in evidence, they are not part of the evidence.

(Deposition of Robert F. Cole, taken in behalf of the plaintiff, at Washington, D. C., October 5, 1946, was handed to the reporter and marked for identification as "Brotherhood's Exhibit 10, 10/15/46, OP.")

Mr. Judge: I will just offer this, your Honor, in toto without reading any parts of it.

The Court Received in evidence.

(Which said Brotherhood's Exhibit 10, so offered in evidence, having been previously duly marked for identification, is in words and figures as follows:)

Brotherhood's Exhibit 10.

Washington, D. C.,
Saturday, October 5, 1946.

Deposition of Robert F. Cole, a witness of lawful age, called on behalf of the plaintiff, pursuant to notice and supplementary notice, copies of which are attached to the court copy of this deposition, at Room 2012, Old Interior Building, Washington, D. C., beginning at 11:00 o'clock a. m., before Lucius V. Friedli, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

Joseph C. Waddy, Esq., and Morris Miller, Esq., appearing for Victor Packman, Esq., St. Louis, Missouri, on behalf of the plaintiff.

Alvin J. Baumann, Esq., representing Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, and St. Louis-San Francisco & Texas Railway Company.

Charles R. Judge, Esq., representing the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

Thereupon,

ROBERT F. COLE,

was called as a witness on behalf of the plaintiff, and, after having been first duly sworn by the notary, was examined and testified as follows:

Direct Examination.

By Mr. Waddy:

Q. Will you state your full name? A. Robert F. Cole.

Q. Are you connected with the National Mediation Board? A. Yes.

Q. What position do you hold? A. Secretary.

Q. Were you connected with the National Mediation Board during the month of March, 1946? A. Yes.

Q. What was your position at that time? A. Secretary.

Q. In your capacity as secretary for the National Mediation Board, are you the official custodian of the records and correspondence dealing with matters pertaining to that Board? A. Yes.

Q. Mr. Cole, I will read to you what purports to be a night letter sent by Western Union telegram dated March 19, 1946, as follows:

"We beg your favor to have Mr. C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen; 528 Woodruff Building, Springfield, Mo., and Mr. H. L. Worman, Chief Operating Officer, Mr. C. P. King, Assistant to Chief Operating Officer, St. Louis-San Francisco Railway Company,—St. Louis-San Francisco & Texas Railway Company, set aside agreement to become effective April 1st, 1946, which will cause myself and other negro trainmen to lose their jobs, until we can have the matter settled under the provisions of the Railway Labor Act, 1934, since you are the administrators of Railway Labor Act. Wire answer collect, to 2103a Market Street, St. Louis, Mo.

"JAMES M. TILLMAN,
"S. L. HOWARD,
"OTHO McKINNEY,
"and others."

(Copy of the night letter referred to was marked Plaintiff's Exhibit No. 1, Cole deposition, and is attached to the court copy of this deposition.)

Q. I ask you if that telegram was sent to the National Mediation Board, and if you have that on record.

A. It was, and it is of record.

Mr. Waddy: I offer that in evidence.

Mr. Baumann: On behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company, I object to the introduction of this telegram because of lack of materiality and relevancy to the proceedings.

Mr. Judge: On behalf of the Brotherhood of Railroad Trainmen and Mr. C. O. Carnahan, General Chairman thereof, I make the same objection.

Mr. Baumann: May we have the understanding that the same objection will run to all such communications and to any testimony by Mr. Cole respecting the operation of or anything pertaining to the Mediation Board, the materiality and relevancy of which we are objecting to?

Mr. Miller: I would like to have you raise that objection each time. There will not be so very many.

Mr. Baumann: O. K., if you wish it that way.

Mr. Waddy: On behalf of the plaintiff, I would like to say that the purpose of the introduction of these documents is to show that the plaintiff in the case appealed to the National Mediation Board and asked them to exercise their jurisdiction, and the plaintiff was advised by the Board that they had no such jurisdiction over the matter.

Mr. Judge: In that case, on behalf of the Brotherhood [or] Railroad Trainmen and C. O. Carnahan, General Chairman thereof, I would like to make the additional objection that there has been no showing of compliance with the rules of the National Mediation Board.

Mr. Baumann: I will join in that objection, and add to it that the Railway Labor Act speaks for itself as to the jurisdiction of this Board.

By Mr. Waddy: Q. Mr. Cole, I present to you a Western Union telegram dated March 20, 1946, addressed to James M. Tillman and signed by Robert F. Cole, Secretary, National Mediation Board, and ask you if you can identify it.

A. Yes; the copy which is in our records is an exact copy of that telegram.

Mr. Waddy: We will introduce that telegram in evidence.

Mr. Baumann: Please note the same objection as made to the other.

Mr. Judge: Same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(The telegram referred to, marked Plaintiff's Exhibit No. 2, Cole deposition, is attached to the court copy of this deposition and reads as follows:

"James M. Tillman,
"2103A Market Street, St. L.

"Your telegram regarding agreement between St. Louis-San Francisco Railway and Br. T. received. Please advise details, including date of agreement and provisions complained of; also payroll designation of colored employees involved in matter. Do these colored employees have any agreement with carrier?

"ROBERT F. COLE,
Secretary,
National Mediation Board.")

By Mr. Waddy: Q. Mr. Cole, I will read to you from a paper purporting to be a Western Union telegram addressed to Robert F. Cole, Secretary, National Mediation Board, and to the Chairman and members of the National Mediation Board, Washington, D. C., as follows:

"My organization, The Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, have a contract dated February 2, 1944, between my organization and J. M. Kurn and Frank A.

Thompson, Trustees, St. Louis-San Francisco Railway Company, St. Louis, Missouri.

"Mr. J. M. Kurn and Frank A. Thompson, Trustees, St. Louis-San Francisco Railway Company and Mr. C. O. Carnahan, General Chairman, Trainmen Brotherhood of Railroad Trainmen, 528 Woodruff Building, Springfield, Missouri, have made a contract to become effective April 1, 1946, which violates Section #5 and Section #6 of the Railway Labor Act of 1934, by taking away from train porters (trainmen) their positions on all passenger trains operated by St. Louis-San Francisco Railway Company, St. Louis-San Francisco & Texas Railway Company, in violation of our contract dated February 2, 1944.

"Please have contract made by officers of (Frisco Lines) and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, effective April 1, 1946, which takes away positions of train porters (trainmen) set aside until matter can be settled in accordance with Section #5 and Section #6 of the Railway Labor Act of 1934.

"Wire answer collect to:

"LEWIS W. FAIRCHILD,
General President,
Brotherhood of Trainmen,
Brakemen, Porters, Switchmen,
Firemen and Railway Employees,
Inc., 2103a Market Street,
St. Louis, Missouri."

I ask if that is a correct copy of the telegram received in the office of the National Mediation Board March 20, 1946. A. It is.

Mr. Waddy: I would like to introduce this into the record.

Mr. Baumann: Please note the same objection on behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company.

Mr. Judge: The same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(Copy of telegram referred to is attached to the court copy of this deposition as Plaintiff's Exhibit No. 3, Cole deposition.)

By Mr. Waddy: Q. Mr. Cole, I am reading to you what purports to be a night letter dated March 20, 1946, addressed to Hon. Robert F. Cole, Secretary, National Mediation Board, Washington, D. C., as follows:

"Reply to your telegram of even date. Date of agreement between Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company-St. Louis-San Francisco & Texas Railway Company and C. O. Carnahan, General Chairman-Trainmen, Brotherhood of Railroad Trainmen at Springfield, Missouri, March 7, 1946, provision in the agreement complained of was same as case No. 3 of strike ballot, agreement reached at above date as follows: 'Effective April 1, 1946, the practice of train porters performing work generally recognized as brakeman's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2, 1945, where claims have been submitted to be paid.' Payroll designation of colored employees involved in matter, James M. Tillman, Train Porter No. 98908, Simon L. Howard, Train Porter No. 92100, Otha McKinney, Train Porter No. 5651.

"The colored employees have an agreement between Frank H. Thompson, Trustee, St. Louis-San Francisco Railway Company and Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., dated at St. Louis, Missouri, February 2, 1944. If National Mediation Board desires conference on matter, will be glad to come to Washington on matter. Please advise immediately if National Mediation Board will take jurisdiction in matter as effective date is April 1st. Please wire collect.

"JAMES M. TILLMAN,
"SIMON L. HOWARD,
"OTHA McKINNEY,
"2103a Market Street,
St. Louis, Missouri."

I ask you if that is a copy of a telegram received at the offices of the National Mediation Board. A. It is.

Q. And the original of that copy is a part of your files? A. It is.

Mr. Waddy: I want to introduce that into the record.

Mr. Baumann: Please note the same objection on behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company.

Mr. Judge: The same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(Copy of night letter referred to marked Plaintiff's Exhibit No. 4, Cole deposition, and the same is attached to the court copy of this deposition.)

By Mr. Waddy: Q. Mr. Cole, I show you a Western Union telegram dated March 21, 1946, signed Robert F. Cole, Secretary, National Mediation Board, and ask you if you can identify it.

A. The carbon copy in our files is a correct copy of that.

Mr. Waddy: I would like to introduce that into the record.

Mr. Baumann: Same objection on behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company.

Mr. Judge: Same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(The telegram referred to was marked Plaintiff's Exhibit No. 5, Cole deposition, and is as follows:

"Lewis W. Fairchild, General President:

"Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., 2103A Market Street, St. Louis. Re wires March 20 concerning your controversy with St. Louis-San Francisco Railway: we are writing you on this subject today.

"ROBERT F. COLE, Secretary,
National Mediation Board.")

By Mr. Waddy: Q. Mr. Cole, I read to you from what purports to be a Western Union night letter dated March 21, 1946, addressed to Mr. Robert F. Cole, Secretary, National Mediation Board, Washington, D. C., as follows:

"Supplementing our Western Union night letter dated March 20th, 1946, St. Louis-San Francisco Railway Company and St. Louis-San Francisco & Texas Railway Company matter involving train porters (trainmen) on these two railroads, I now have advice from Mr. T. S. McFarland, Executive Secretary, First Division, National Railroad Adjustment Board, upon same matter which advice was contained in Western Union telegram dated at Chicago, Ill., March 20th, 1946. The content of Mr. T. S. McFarland Western Union telegram reads as follows:

" 'The First Division is without authority under the Railway Labor Act to comply with your request to set aside agreement described your telegram date.

'Signed. T. S. McFARLAND,
Executive Secretary.'

"If you now have any further advice to me upon this subject, please send advice by Western Union telegram collect to me at address shown below.

"LEWIS W. FAIRCHILD, General President, Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, 2103a Market Street, St. Louis, Missouri."

(Copy of night letter referred to was marked Plaintiff's Exhibit No. 6, Cole deposition, and is attached to the court copy of this deposition.)

Q. I ask you if that is a true copy of a telegram received by your Board. A. Yes, it is.

Mr. Waddy: I would like to introduce that as a part of the record.

Mr. Baumann: Same objection on behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company.

Mr. Judge: Same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

By Mr. Waddy: Q. Mr. Cole, I show you a letter dated March 21, 1946, addressed to Mr. Lewis W. Fairchild, General President, Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., 2103A Market Street, St. Louis, Missouri, and ask you if you can identify it.

A. This is the original of a carbon copy of a letter contained in our files.

Q. And that letter was sent by you to the person to whom it was addressed? A. It was.

Q. In your official capacity as Secretary of the National Mediation Board? A. Yes.

Mr. Waddy: I would like to introduce that letter and have it made a part of the record.

Mr. Baumann: Same objection on behalf of Thompson, Trustee, and the St. Louis-San Francisco & Texas Railway Company.

Mr. Judge: Same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(The letter referred to was marked Plaintiff's Exhibit No. 7, Cole deposition, and is attached to the court copy of this deposition, and reads as follows:

"Mr. Lewis W. Fairchild, General President,
Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc.,
2103A Market Street,
St. Louis, Missouri.

"Dear Mr. Fairchild:

"This will [acknoledge] your telegram of March 20, 1946, also telegram signed by James M. Tillman, Simon L. Howard, and Otha McKinney, complaining of an agreement made recently between the St. Louis-San Francisco Railway and the St. Louis-San Francisco & Texas Railway

Companies with the Brotherhood of Railroad Trainmen, which you claim violates your agreement with the carrier dated February 2, 1944.

"Your request that this Board have the above mentioned contract between the Frisco Lines and the Brotherhood of Railroad Trainmen set aside until the matter can be settled in accordance with Sections 5 and 6 of the Railway Labor Act has been noted. After consideration of the dispute, as described in your telegrams, it appears that the matter comes properly under the heading of a claimed violation of the terms of your agreement of February 2, 1944, and such a matter would come under the provisions of Section 3 of the Railway Labor Act rather than Sections 5 and 6. The Act clearly distinguishes between railroad controversies growing (1) out of failure to comply with the provisions of the Railway Labor Act, (2) out of the interpretation or application of the terms of existing agreements, and (3) out of requests to make a new agreement or to change or amend an existing agreement. The first type of controversy is subject to consideration by the courts, the second is referable to the National Railroad Adjustment Board, and the third type may be mediated by the National Mediation Board, provided that due notice has first been served under the provisions of Section 6 of the Act.

"It appears that the agreement now in effect between the Frisco Lines and your organization covers rates of pay, rules and working conditions of train porters. We have been unable to find therein any specific description of the duties of these positions. Your telegram of March 20 makes the specific statement that the contract recently executed between the carriers and the Brotherhood of Railroad Trainmen is in violation of your contract dated February 2, 1944. If such is the case, your remedy is to apply to the appropriate division of the National Railroad Adjustment Board.

"In this connection, it may be stated that it is the management's function to determine its procedural duties and liabilities under the law and it is, of course, the prerogative of the organization to take exception if it so desires to the carrier's action and to employ such means of legal adjustment of such issues as it may deem advisable.

"As the matter now stands, the National Mediation Board cannot assume jurisdiction and attempt to mediate this controversy.

"Very truly yours,

"ROBERT F. COLE,

Secretary.")

By Mr. Waddy: Q. Mr. Cole, I show you a telegram dated March 22, 1946, addressed to Lewis W. Fairchild, General President, Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., and ask you to identify it.

A. It is the original of a carbon of a telegram contained in our records.

Q. And that telegram was sent by you to Lewis W. Fairchild? A. It was.

Q. From the National Mediation Board? A. Yes.

Mr. Waddy: I would like to introduce that and make it a part of the record.

Mr. Baumann: Same objection on behalf of Thompson, Trustee, and the St. Louis San Francisco & Texas Railway Company.

Mr. Judge: Same objection on behalf of the Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman thereof.

(The telegram was marked Plaintiff's Exhibit No. 8, Cole deposition, and is attached to the court copy of this deposition, and is as follows:

"Lewis W. Fairchild, General President,
Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc.,
2103A Market Street, St. Louis.

"As explained to you in our letter now in mails, your dispute involves a claimed violation of your agreement of February 2, 1944, and as such comes properly before National Railroad Adjustment Board. Neither that Board nor the National Mediation Board has any authority under

Railway Labor Act to set aside agreements made between carriers and organizations. You may desire to secure legal advise as to your further procedure. As matter now stands, National Mediation Board is without jurisdiction.

"ROBERT F. COLE, Secretary;
National Mediation Board.")

By Mr. Waddy: Q. Mr. Cole, at the time that you were receiving and answering telegrams from representatives of the porters of the Frisco Lines, did you have any correspondence with the secretary or any other official of the National Railway Adjustment Board concerning this matter?

A. I find nothing in our files to indicate that we did.

Q. Was the effect of the communications that you had with the representatives of the porters to deny the jurisdiction of the National Mediation Board over their dispute?

A. Yes.

Q. Would your files show that you had any conversation or interviews with the secretary or any member of the National Railway Adjustment Board during the period that this matter was being discussed or handled with you?

A. There is no record of any such conversation.

Q. Or other conference, in any way?

A. Or other conference.

Mr. Waddy: That is all.

Cross Examination.

By Mr. Judge:

Q. Mr. Cole, do you have in your files a contract between the carrier here and the organization representing the train porters? A. Bearing what date?

Q. Bearing date of February 2, 1944. A. Yes.

Q. What is the labor organization there representing the train porters?

A. Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated.

Mr. Judge: I offer that in evidence.

Mr. Waddy: On behalf of the plaintiff, we object to the admission in evidence of the contract, as being immaterial to the issues in this case.

(It was stipulated that at the time of trial Mr. Judge might file a copy of the contract introduced by him, there being no copy available at the time of the taking of the deposition, the copy to be marked Carnahan Exhibit No. 1.)

Mr. Judge: I have nothing more.

Further Cross Examination.

By Mr. Baumann:

Q. Mr. Cole, will you state what date the copy of the contract that you just identified was filed with your office?

A. March 29, 1946.

Q. And it is customary to file agreements of this type with your office? A. It is.

Q. Or is it mandatory?

A. It is mandatory under the Railway Labor Act.

Q. Does your Board recognize the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, as the collective bargaining agent of train porters and other porters on the Frisco System? A. Yes.

Mr. Baumann: That is all.

Redirect Examination.

By Mr. Waddy:

Q. Mr. Cole, does the fact that your Board recognizes the organization that you just mentioned as a bargaining agent of the train porters on the Frisco Railroad necessarily make them a separate craft or class?

Mr. Judge: I object, on the ground that it is asking for the legal conclusion of the witness on an interpretation of the Railway Labor Act.

Mr. Baumann: Same objection.

The Witness: No.

Mr. Waddy: That is all.

Recross Examination.

By Mr. Baumann:

Q. Mr. Cole, are you merely the administrative officer of the Board? As Secretary, you do not pass on questions of jurisdiction? Yours is merely administrative?

A. That is right.

Mr. Baumann: That is all.

Further Redirect Examination.

By Mr. Waddy:

Q. Mr. Cole, to your knowledge, are there other railroad carriers on which the same craft or class has more than one representative?

Mr. Judge: I want to put in an objection to that question, on the ground that the National Railway Labor Act speaks for itself in that matter.

Mr. Baumann: I join in that objection.

The Witness: I would not know without examining the records of the Board.

By Mr. Waddy:

Q. I call your attention to the Louisiana & Arkansas Railroad and the crafts of firemen and brakemen. Are there not separate representatives on that railroad for whites and colored?

A. Again I would not know without examining the record on that.

Q. Do you have the record available?

A. There is nothing contained in the Eleventh Annual Report of the Board showing agreements on the Louisiana & Arkansas Railway to show a divided representation—on what craft?

Q. Take the brakemen, for instance.

A. (Continued) For brakemen.

Q. The brakemen on the Louisiana & Arkansas Railway do form a class or craft, do they not?

A. You are getting into another question which should be addressed to the National Mediation Board.

Q. Mr. Cole, do you have in your files, then, contracts for the brakemen of the Louisiana & Arkansas Railway, and, if so, please present them?

A. I know that we have one for the Brotherhood of Railroad Trainmen. I do not know if we have others or not without examining the records.

Q. Is it not true that they have a contract with the Association of Colored Railway Trainmen and Locomotive Firemen covering the craft of brakemen?

A. It is not shown in the Eleventh Annual Report.

Q. You have other files, do you not? A. Yes.

Q. Will you take those other files and find out?

(After a brief recess:)

A. On July 13, 1940, the carrier sent us an agreement covering wages and working conditions of all colored train, yard, and enginemen on the L. R. & N. district, effective December 1, 1936.

Q. That is the L. R. & N. district of what railroad?

A. Of the Louisiana & Arkansas Railway.

Q. Then there is also a contract covering white trainmen on the Louisiana & Arkansas Railway? A. There is.

Q. With another organization? A. Yes.

Mr. Waddy: That is all.

Mr. Judge: I do not have any more questions.

Mr. Baumann: No questions.

.....

Sworn and subscribed before me this ..... day of October, 1948.

.....
Notary, D. C.

Mr. Judge: I would like to offer in evidence Brotherhood's Exhibit 1, which is the seniority roster for the Birmingham and Tupelo Subdivisions, and Brotherhood's Exhibit 2, Train Schedule.

The Court: They will be received in evidence.

Mr. Judge: Three and four are up there on your desk. That is the Circular No. 1 of the Adjustment Board, and

the other is the Opinion of the Attorney General, 5, 6, 7 and 8 are Awards of the National Railroad Adjustment Board, First Division, which have been identified by Award numbers.

Mr. Packman: May I be heard, your Honor? We object to the introduction of these exhibits on the ground they are irrelevant to the issues in this case. They are not between the same parties that are parties to this lawsuit. In fact, none of the Frisco Lines seem to be a party to any of these disputes with the B. of R. T., nor was Mr. Howard a party to them. We do not know what the working conditions were or what the facts or contracts were in connection with this situation, have no privilege of cross-examining witnesses with respect to the rules in these awards. They have no probative force and simply tend to clutter up the record.

The Court: What are they?

Mr. Judge: They are Awards in connection with individuals working for certain railroads who were protected by the B. of R. T. They took it up before the Adjustment Board.

The Court: Subject to Plaintiff's objections, for whatever they are worth, they will be received.

Mr. Judge: I offer in evidence Brotherhood's Exhibit 9, which is a memorandum of G. H. Schleyer, General Superintendent, First District, and J. E. Hutchison, General Superintendent, Second District, to Mr. J. M. Kurn, under date of August 3, 1918. (Reading)

Brotherhood's Exhibit 9.

"Replying to your letter of the 31st ultimo, file 1573-20, enclosing inquiry number 33, concerning rate of pay colored train porters as compared with that of white passenger train brakemen or flagmen; and answering the questions in order listed:

"(a) Applicants for positions of train porters are required to pass physical examination, which is similar in all respects to that which the white applicants for passenger train brakemen or flagmen are required to meet.

"(b) The white brakemen or flagmen must have higher educational qualifications than the porters. The brakemen or flagmen are required to pass examination on train rules (just the same as conductors), while the porters do not. The brakemen or flagmen must of necessity become a more important member of the train crew than the porters. The brakemen or flagmen are held responsible, to a certain degree, along with the conductor, for the proper execution of train orders; while the porters are not.

"(c) In other than block signal territory there is little responsibility with the porter for the protection of a train or execution of train orders. In block signal territory, he is required to flag through blocks when occasion demands. This for the reason that the brakeman or flagman must be reserved for rear end protection. The porter's principal duty consists of keeping cars clean enroute, assist in loading and unloading passengers, baggage, and express and other work of a like nature. The porter is also required to announce stations for the information of passengers.

"(d) Colored train porters are paid $71.50 per month on a trip basis, while white passenger brakemen or flagmen are paid $114.80 or $117.60, according to the run, per month, on a trip basis. The reasons for this difference are stated above.

"Aside from the labor organizations and the color line, there is no reason why the porter should not assume as great responsibility and receive as high wage as the white brakeman or flagman. If the porters wages were increased to equal that received by the white brakemen or flagmen it is reasonable to presume that the brakemen or flagmen would protest and contend for a higher wage.

(Signed) G. H. SCHLEYER,
General Superintendent
First District.

J. E. HUTCHISON,
General Superintendent
Second District."

Mr. Judge: If the Court please, it was originally the intention of the Defendant Brotherhood to also place on the stand Mr. C. O. Carnahan, defendant here; however, I believe that all of his testimony would only be repetitive, and for that reason will not place him on the stand.

Mr. Packman: What did you say the reason was you didn't put him on the stand?

Mr. Judge: It would be repetitive of any other testimony here so far as our case is concerned.

Mr. Packman: Could the Court draw the inference if the testimony were given it would be adverse to the position of the defendant?

The Court: Of course, I am not going to draw any inference about anything.

Mr. Packman: We suggest you put him on or we will draw that inference.

Mr. Judge: You can put him on.

Mr. Packman: May we put him on for a limited purpose, your Honor?

The Court: You have a right to put on rebuttal testimony, whatever or whoever it is.

With respect to counsel's observation concerning the Court's inference, I think in a case of this kind the Court is not going to draw any inference I don't see any very great amount of disagreement to the facts in the case. It is pretty much admitted. So, there is nothing the Court can infer. Go ahead.

Plaintiff's Rebuttal Testimony.

Whereupon, the plaintiff, to rebut the testimony offered by the defendant, offered testimony, oral and documentary, and made admissions as follows, to-wit:

C. O. CARNAHAN,

being produced, sworn and examined on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination.

By Mr. Packman:

Q. State your full name for the record.

A. C. O. Carnahan.

Q. Where do you live? A. Springfield, Missouri.

Q. Your occupation?

A. President and General Chairman of the Brotherhood of Railroad Trainmen, Frisco Lines.

Q. Have you been an employe of the Frisco Lines for how long? A. Twenty-six years.

Q. Are you still an employe?

A. I still hold my seniority rights. I am on leave of absence.

Q. What occupations have you qualifications for on the Frisco Lines?

A. I can answer that by stating what occupations I have worked at.

Q. Well, have you worked as a brakeman? A. Yes, sir.

Q. Have you worked as a conductor? A. Yes, sir.

Q. What is the last occupation you have worked at for the Frisco Lines?

A. You mean the last service I performed?

Q. That is right.

A. The last service I performed was after I had taken a leave of absence in an emergency, they called me as a yard man. I performed two days switching as an accommodation when they were temporarily out of men.

Q. Did that make you a switchman?

A. It didn't establish my rights on the seniority roster as a switchman because our contract rules provide that roadmen used temporarily in yard work will not establish seniority rights.

Q. Have you acted as a conductor? A. Yes, sir.

Q. When was the last time?

A. I can tell you approximately the date. I was in service as a conductor prior to taking over the job as general chairman. Let's see, it was in October, 1944.

Q. The B. of R. T. act as the statutory bargaining agent for conductors?

A. Not on the Frisco property. We do on some lines.

Q. While you were working as conductor on the Frisco property, there was another statutory bargaining agent taking care of your interests, correct?

A. There was a legally authorized representative of the—

Q. (Interrupting) Craft? A. (Continuing) —conductors.

Q. Known as conductors? A. Yes, sir.

Q. At the same time you were a member of the B. of R. T.? A. Yes, sir.

Q. Would you say that your failure to have membership in the B. of R. T. made you any less than a conductor?

A. I wouldn't have been eligible for the O. R. C.

Q. O. R. C., pardon me.

A. The question there was brought up before on the seniority roster, men promoted from one craft to the other and over a period of years, with the fluctuation of business, a man might work as a conductor thirty days and be back for thirty days on a job braking, so it is customary for those men on the border line to hold seniority in one organization or the other until they are firmly established.

Q. However, you were still a conductor without belonging to the organization that was a collective bargaining agent for that particular group? A. That is right, sir.

Q. And you maintained your membership in the B. of R. T.? A. Yes, sir.

Q. It was of another craft? A. Yes, sir.

Mr. Packman: That is all.

Mr. Judge: No questions.

Mr. Baumann: No questions.

The Court: That is all.

(Witness excused)

C. P. KING,

recalled to the stand, having been previously sworn and examined on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination.

By Mr. Packman:

Q. Mr. King, Brotherhood's Exhibit No. 9 was shown to you before, copy of a letter from Mr. Schleyer and Mr. Hutchison addressed to Mr. Kurn under date of August 3rd, it was read to the Court, and in Paragraph B this statement was read as representing conditions as they existed in August—August 3rd, 1918. As I read it to you bear in mind whether or not these facts still prevail and then I will ask you specific questions.

"The white brakemen or flagmen must have higher educational qualifications than the porters."

Is that a fact any more?

A. That letter is August 3rd, 1918, is it not?

Q. Yes, sir, August 3rd, 1918. We are not challenging the verity of 1918 but what are the facts today, as of the year 1946—'45?

A. For the railroad as a whole, we have no general instructions on educational background for either brakemen or porters. Generally, at the present time, there is no difference between the educational background required for either craft.

Q. The next sentence: "The brakemen or flagmen are required to pass examination on train rules just the same as conductors, while the porters do not." Does that hold true any more?

A. Both brakemen and porters are required to pass an examination on transportation rules.

Q. The next sentence: "The brakemen or flagmen must of necessity become a more important member of the train crew than the porters." What does that "must of necessity" mean?

A. Well, that would be a matter of opinion, I think, Mr. Packman.

Q. Going on to the next sentence: "The brakemen or flagmen are held responsible, to a certain degree, along

with the conductor, for the proper execution of train orders; while the porters are not.". Does that hold true any more?

A. The porters are held responsible to a certain degree for the execution of train orders.

Q. As much as a brakeman for the orders which he picks up?

A. Well, I think that would depend on the circumstances in an individual case.

Q. But it is unfair to state that the porters are not responsible for the execution of train orders within their province?

A. I know of instances where they have been held responsible.

Q. Next sentence: "In other than block signal territory there is little responsibility with the porter for the protection of a train or execution of train orders." Is that true any more?

A. Well, to answer that intelligently, I think you might have to consider what they had in mind, the brakeman, or flagman on a passenger train occupies a position on the rear of the train and he normally does all of the rear end flag protection. Therefore, he does a lot more flag protection than the train porter does.

Q. But when he is on the head end, is there any more he has to do than a train porter, or any more responsibility?

A. When he is on the head end, there is no more responsibility to flagging on a brakeman than there is on a porter.

Mr. Packman: That is all.

Mr. Judge: No questions.

Mr. Baumann: No questions.

Mr. Packman: Plaintiff rests.

Whereupon, the plaintiff rested his case.

Whereupon, the defendants rested their case.

The Court: What do you say—

Mr. Packman: (Interrupting) I should like to—

The Court: (Continuing) —as to the filing of a brief?

Mr. Packman: We should like to have the transcript written up to assist us.

The Court: I would rather hear the oral arguments after the brief and replies are in and I go over this stuff. There is a mass of stuff I have heard and I haven't in mind definitely. I think it is much better if you prepare a brief and give me an opportunity to go over it and read the decisions and get the questions of law that you have. If you start arguing with me now, you are going to be all over the field and I think we can boil down in oral argument the matters that are of vital concern. Do you gentlemen agree that that is true?

Mr. Packman: That is right.

Mr. Judge: That is right.

Mr. Baumann: That is right.

Memorandum Opinion.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Simon L. Howard, Sr., Plaintiff,

v.

Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a Corporation, Debtor,

and

St. Louis-San Francisco & Texas Railway Co., a Corporation,

and

Brotherhood of Railroad Trainmen, an Unincorporated Association,

and

C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, Defendants.

No. 4452.

Plaintiff is a resident and citizen of the State of Tennessee. The defendant St. Louis-San Francisco Railway Company is a corporation organized under the laws of the State of Missouri, with its principal place of business in the City of St. Louis. The defendant St. Louis-San Francisco & Texas Railway Company is a corporation organized under the laws of the State of Texas. Defendant Frank A. Thompson, trustee of the corporate defendants, is a resident and citizen of the City of St. Louis, Missouri. The defendant Brotherhood of Railroad Trainmen is a voluntary organization, and C. O. Carnahan is General Chairman of the Brotherhood of Railroad Trainmen, with headquarters in Springfield, Missouri.

The defendants will be hereafter referred to as the "Carriers" and as the "Brotherhood."

Plaintiff, a train porter, an employee of the trustee of the St. Louis-San Francisco Railway Company, seeks to enjoin the defendant trustee from discharging him and approximately 125 other train porters in the employ of the defendant carriers, and to enjoin the defendant Brotherhood of Railroad Trainmen from coercing the defendant trustee to abolish the position of train porter on trains of the Carriers, and to void a contract entered into between the trustee and the Brotherhood of Railroad Trainmen on March 7, 1946 under the terms of which it was agreed that the trustee would in the future prohibit train porters from performing any of the duties or functions of brakemen on passenger trains.

Plaintiff and those in whose behalf he brings this suit, are members of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, an organization composed entirely of negroes employed in various capacities by carriers. The membership of the Brotherhood of Railroad Trainmen is composed of brakemen, yardmen, etc.

Plaintiff has been in the employ of the St. Louis-San Francisco Railway Company and Frank A. Thompson, its trustee, about 33 years. During part of that time he was employed as a freight brakeman, but because of an injury rendering him physically incapable of carrying on the duties of brakeman, he was employed as a porter.

For approximately 40 years, plaintiff and those in whose behalf he brings this suit, in the performance of the duties and functions assigned to them, have been known and designated by the Carriers as "train porters," and during all of that time, either in accordance with custom or orders of their employers, they have performed some or all of the functions ordinarily classified as duties of brakemen on passenger trains, i. e., to assist in the operation of the train, receive and transmit orders to the conductor, engineer and the fireman, throw switches, flag trains and such other and further duties as might be required of them by the conductor in charge of the train.

Train porters have for many years been composed entirely of negroes, and according to the testimony, although

they have performed all of the functions and duties of a head-end passenger [brakemen] in addition to their general duties of assisting passengers to board and alight from trains, keep the cars, steps and other facilities clean and free from accumulation of dirt and debris, their salaries, with the exception of a short period of time during World War I, have been materially less than those received by white brakemen who were not required to clean cars and to generally assist passengers off and on trains.

For a long period of time there has been a controversy between the Brotherhood of Railroad Trainmen and the Carriers concerning the performance of so-called brakemen duties by train porters. In fact, there has been a controversy of long standing between the white employees of the Carriers and the Carriers respecting employment of negroes. In 1928 this culminated in a contract entered into between the Carriers and the Brotherhood that in the future, negroes would not be employed as brakemen or firemen. Since that time no negroes have been employed for service in either of those capacities. However, those negroes who were already in the employ of the Carriers, as firemen and brakemen continued in their employment, and under the terms of the contract, their rights of seniority were to be preserved.

The controversy between the Brotherhood and the Carriers with respect to the performance of brakemen's duties by the porters, finally resulted in a contract entered into between the Brotherhood and the Carriers on March 7, 1946 as the result of the threatened strike in 1945. Case No. 3 was among the cases submitted to the members for a vote. Mr. King, Assistant to the Chief Operating Officer of the St. Louis-San Francisco Railway Company, testified that the Carriers reluctantly entered into the contract to prevent a strike, the Brotherhood insisting that its demands must be agreed to or the members would strike. There was no demand on the part of the Brotherhood to discharge the train porters.

Subsequent to entering into said contract, the Carriers determined that if train porters were not permitted to perform the functions of brakemen as in the past, their services were no longer economically desirable, and they notified this plaintiff and all other train porters, that the

position of train porter, except chair car porters, would be abolished, and required all persons holding such positions to turn in their equipment on April 1, or as soon thereafter as their duties and responsibilities would permit.

Upon receipt of said notice, the plaintiff instituted this suit, alleging that he, and those in whose behalf this suit is brought, are in fact brakemen by virtue of the particular functions they perform, and that as such, it was the duty of the Brotherhood of Railroad Trainmen under the Railway Labor Act, to represent their interests and not to discriminate against them; that the contract so entered into was discriminatory, void and in violation of the constitutional rights of such persons; that the porters are entitled to the benefits of any contractual relation resulting from negotiations between the Brotherhood and the Carrier.

Plaintiff also alleges that he and those in whose behalf he brings this suit, "have no administrative or statutory remedies to maintain the status quo of their jobs or their seniority, disability and retirement rights or to prevent their economical displacement, and no adequate remedies at law." He seeks to enjoin the defendant Carriers from discharging such persons, and to void the contract between the Carriers and the Brotherhood, and to enjoin the Brotherhood from obtaining the benefits of the agreement negotiated between the railroads on March 7, 1946 and from taking over the jobs of the plaintiff and other train porters under said agreement, or any similar agreement or conspiracy to deprive citizens of the United States of a livelihood because of their race or color. A temporary restraining order was granted to restrain the Carriers from discharging plaintiff and those in whose behalf this suit was brought.

The by-laws of the Brotherhood of Railroad Trainmen excludes negroes from membership, except in states in which such exclusion is prohibited by law, and in those states the exclusion is successfully effected by means of the "blackball." The Brotherhood of Railroad Trainmen is a fraternal organization composed of white persons belonging to a certain craft in their employment by the Carriers, and admission to membership is gained after a certain period of employment by the Carrier, by applica-

tion submitted to the proper officers of the Brotherhood, and by ballot. Applicants may be rejected by means of the "blackball." There are no negro members of the Brotherhood of Railroad Trainmen. The evidence tends to show that in the past there have been a few attempts on the part of negroes to joint that Brotherhood, but they have not been permitted to do so.

Apparently the train porters were unorganized and without representation as a group prior to about February, 1921. For many years prior to World War I persons performing the duties of the plaintiff and his group had been designated by the railroads as "train porters" and had come to be recognized throughout the railroad industry as a class, and their pay, as heretofore stated, was considerably less than the pay of brakemen, who were white men, performing only the duties of brakemen.

On December 2, 1918 William G. McAdoo, Director General of Railroads, issued an order equalizing the pay of those persons performing the duties that train porters were then performing, and have since performed. Which order is as follows:

"1. Employees in a passenger train crew, except conductor, collector and baggagemaster, qualified and regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly:

(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

(b) Use hand and lamp signals for the protection and movement of trains.

(c) Open and close switches.

(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

(e) Compare watches when required by rule.

"2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

"3. This order shall not curtail the duties of employees heretofore classed as 'train porters.'

"4. This order shall not infringe upon the seniority rights of white trainmen.

Signed "W. G. McADOO,
Director General of Railroads."

This order continued in effect until February 1, 1921 although the title "train porters" continued to be recognized by the railroads. When the railroads were turned back to their owners, and effective February 1, 1921, the railroads reclassified the train porters in so far as their pay was concerned, although their duties remained the same, and reduced their rate of pay materially below that which they were receiving under the Director General's Order.

In a proceeding against the Frisco Railway in protest against a reduction in wages, the first organization of train porters came into existence. This was designated a "Proceeding by more than 100 employees against the Frisco Railway in protest against reduction in wages effective February 1, 1921 applying to all colored trainmen working the head-end of passenger trains." This committee represented the "train porters." The protest of this group was ineffectual in bringing about a rescission of the order. In September 1921 the Frisco Railway negotiated an agreement effective February 11, 1921, with Sandy Eslinger, acting as general chairman of the group of train porters. Subsequently 112 of the 145 employees concerned, signed a written ratification of that agreement. Sandy Eslinger continued to represent the train porters from 1921 until about 1930. Some time during that period a charter was granted by the American Federation of Labor to the "Trainmen, brakemen and porters' union," but was subsequently revoked. Thereafter the "Brotherhood of Trainmen, Brakemen, Porters, [Switchman], Firemen and Railway Employees, Incorporated" was organized. The porter group was included in this labor organization.

On February 2, 1944 the B. T. B. P. S. F. & R. Employees, Incorporated, negotiated and signed an agreement with the trustees of the Frisco Railway defining rates of

pay, and for separate seniority rosters of train porters and chair car porters, and in a limited way, the duties to be performed by train porters, the agreement being headed "Agreement between J. M. Kurn and Frank A. Thompson, Trustees St. Louis-San Francisco Railway Company, Debtor, and Train Porters and Chair Car Porters represented by the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated." As set out in the contract, Article II Rule 2 with respect to the duties of porters, provided:

> "Porters when on duty will be under the jurisdiction of conductor and will perform such duties as may be required." * * *

Article X Rule 27 provided:

> "Train porters will load and unload train boxes, clean and fill lamps and perform such other duties as may be assigned to them by proper authority."

Rules of the Transportation Department define duties of all trainmen, including train porters and they were required to pass a physical examination, carry standard watches, etc. The contract was signed on behalf of "Train Porters and Chair Car Porters by L. H. Hoyl, General Chairman and Vernon C. Coffey, Director-General Attorney, and L. W. Fairchild, General President."

A further contract was entered into on September 22, 1944 providing some changes in the original contract signed on February 3, 1944 with respect to the compensation, vacations, etc.

On July 31, 1946 a contract was entered into between Frank A. Thompson, trustee of the St. Louis-San Francisco Railway Company with train porters and chair car porters represented by the Brotherhood of [Train], Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, revising the rates of pay as determined by the prior contracts. By agreement, this contract was signed without prejudice to this action, which was pending at that time.

On December 21, 1945 the Brotherhood caused to be spread among its members employed in the train and yard

service of Carriers, a strike ballot, including 12 cases. Case No. 3, the one involving the train porters, read:

> "Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co. and claim that additional brakemen covered by and paid under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters and claim of brakemen dated August 2, 1945 be sustained."

Subsequent to the spreading of this ballot, defendant C. O. Carnahan as general chairman of the Brotherhood advised C. P. King, Assistant Chief Operating Officer of the Frisco by letter that:

> "You are hereby notified that a strike of yard and road service employees under the jurisdiction of the Brotherhood of Railroad Trainmen will be effective 6:00 PM Sunday, January 6, 1946."

Pursuant to a request by the Carriers, an Emergency Board was created by the President of the United States, pursuant to Title 45 U. S. C. A., Section 160. This Board convened in the City of St. Louis where hearings were held. The train porters, acting through the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, made application to intervene in the proceeding before said Board, and their application was denied. Thereupon the train porters filed a motion before the Emergency Board for reconsideration of the denial of their petition, which was also denied.

In denying the petition of the train porters, the Emergency Board in its report to the President of the United States, recommended with respect to Case No. 3 that it, with others, "be processed for submission to the National Railroad Adjustment Board, in the event they cannot be disposed of satisfactorily on the property." Thereafter negotiations between the Carriers and the Brotherhood were continued until a settlement was reached. At no time was the representative of the train porters present during the negotiations. With respect to Case No. 3 the settlement provided:

"Effective April 1, 1946, the practice of train porters performing work generally recognized as brakeman's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2, 1945, where claims have been submitted to be paid."

It was pursuant to this agreement that the order abolishing train porter positions and discharging train porters was issued.

The train porters were performing their duties in an efficient manner, and no complaint was expressed against them by their employers, and there was no desire on the part of the Carriers prior to March 7, 1946 to abolish train porter jobs. In response to a question by Mr. Packman as to whether there was a desire on the part of the Carriers prior to March 7, 1946 to retain train porters on the runs as usual, Mr. King answered—"I think it can be fairly stated that that was our preference." Their positions were abolished, and they were separated from the service solely as a result of the contract with the Brotherhood, under the terms of which, certain functions being performed by the train porters were to be given to the brakemen. It was determined by the Carriers that it was economically unsound to supply both a porter and a brakeman on its trains, which theretofore had been served by a porter only.

The plaintiff insists that under the Railway Labor Act, he and other train porters who performed all the duties of brakemen are in fact trainmen, and should be in the same class as head-end brakeman; that the fact that they had been classified as "train porters" for purely functional purposes by the carriers, does not establish their classification for purposes of representation, as provided by the Railway Labor Act, and, being trainmen, although excluded from membership in the Brotherhood, that it was the duty of the Brotherhood as the representative of the trainmen, to represent the interests of the train porters rather than to attempt to bring about their discharge. To sustain their position, they rely upon Steele v. L. & N. R. Co., 323 U. S. 192 in which the rights of a negro fireman were involved.

Plaintiff further contends that the contract entered into on March 7, 1946 between the Brotherhood of Railroad Trainmen and the Trustee was void as against public interest; that it was in violation of the constitutional rights of this plaintiff and those similarly situated; that it was the result of coercion and duress, having been forced upon the Carriers by the Brotherhood under threat of strike.

On the contrary, the defendants insist that there existed between the train porters, the Carriers and the Brotherhood a jurisdictional dispute, and that jurisdiction to determine that question is vested in the National Railroad Adjustment Board under the Railway Labor Act.

The contention of the plaintiff as to the classification of "train porters" and the duty of the Brotherhood to represent them, will be disposed of first.

The court has no jurisdiction to determine the question of whether or not the train porters should be classified as trainmen and represented by the Brotherhood except in so far as it is necessary to determine plaintiff's contention that the contract of March 7, 1946 is void.

"Craft" or "class" is not defined by the Railway Labor Act, and it becomes important in Labor disputes only for the purpose of determining the right of representation of employees with their employers. 45 U. S. C. A., Section 152 Ninth.[1] Under this section exclusive jurisdiction is vested in the Mediation Board to determine the representative of, or the right to represent any craft or class, and the court has no jurisdiction to determine that question. General Committee v. M-K-T R. Co., 320 U. S. 323, l. c. 337. No question ever arose between the employer and the train porters, or between the train porters and the Brotherhood prior to the agreement of March 7, 1946 as to the right to represent, or the obligation to represent the train porters, by the Brotherhood.

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1 "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its service, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier." * * *

For more years than this plaintiff has been employed by the Carriers, train porters have been designated by the Carriers as a particular craft or class. This of course, was for purely functional reasons so far as the Carriers were concerned, but such classification seemed to have been accepted by the porters for purposes of representation in their negotiations with Carriers.

Under Title 45 U. S. C. A. Section, 152 Fourth[2] the carriers had no right to interfere with its employees in the matter of selecting their representative. For 25 years before the contract of March 7, 1946 was signed, the train porters had been organized into a separate class or classification for the purposes of representation, and at least 13 years before the Railway Labor Act of 1934 was passed. While it may be conceded that the formation of the different organizations of which the porters became members, including the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., were actuated by motives of necessity because negroes were not admitted to membership in the standard railroad organizations, whatever the reason may have been, they were classified as train porters, with distinctive duties and responsibilities and limitations as to promotion, and as such, had selected their representative and had negotiated numerous contracts with the carriers over a period of years.

I am unable to reconcile the facts in the Steele case, supra, with the facts in this case. Steele was a fireman for the L. & N. and because of a discriminatory contract entered into between the L. & N. and the Brotherhood of Locomotive Firemen, Steele brought his action to protect his seniority rights. In that case, the court held that it was the duty of the Brotherhood of Locomotive Firemen to represent the minority as well as the majority, and that the negro fireman, who was ineligible to become a member of the Brotherhood of Locomotive Firemen, was entitled to all the benefits of the agreement entered into between

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2 "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. * * *"

the employer and the firemen, and that he could not be discriminated against. There was no question about Steele being a locomotive fireman. There could be no other classification for him because he performed no other duties than those of firing the engine, and he, like all other members of a minority group, was entitled to the benefits of whatever agreement the bargaining agency might derive from a contract. The Brotherhood had no more right to discriminate against him than any other person, white or black, who was employed as a fireman, but who was not a member of the Brotherhood, the bargaining agent. Had Steele been classified as a hostler or an engine wiper and belonged to some other labor organization, yet performing all the duties of a fireman, the holding might have been different, but Steele was never considered in any other class than that of the white employees who were members of the Brotherhood of Locomotive Firemen. Those are not the facts in this case.

The classification "Train porters" at least for functional purposes, was recognized by the Carriers and by all other persons in the railroad industry. The train porters themselves, so far as the record shows, had not disputed it. They had organized themselves into a labor organization and had selected that organization as their representative in all their dealings with the carriers. They had not requested the Brotherhood to represent them prior to the execution of the contract in controversy. If the porters stood here without representation, if they were members of no labor organization and had sought to have the Brotherhood represent them, we might have a different question with respect to classification and representation, but those facts never existed in this case.

If the train porters, as a class, selected their own representative as contemplated by Title 45 U. S. C. A. Section 151 Fourth, supra,[2] in contracting with their employer, then there would be no responsibility on the Brotherhood to represent them,—a craft can have but one representative—Virginian Ry. v. Federation, 300 U. S. 515—nor, was there any legal obligation upon the Brotherhood to refrain from seeking by contract, to obtain for its members, those

duties and functions which they insisted belonged to them. Certainly it cannot be claimed that this is an unusual situation or condition to be found in the labor movement. Although it often may seem unfair to weaker groups, it is almost a daily occurrence that one group seeks to acquire for itself certain functions which theretofore have been performed by another group.

As was said in General Committee, Etc. v. M-K-T R. Co., 132 F. (2) 91, l. c. 94:

> "The most bitter and perhaps the most numerous industrial disputes have come to be those in which classes of employees dispute with their employer and one another over who has the right to control a particular matter; the so-called jurisdictional disputes."

Mr. Eastman in testifying before the Committee of Congress at the hearings on the Railway Labor Act characterized such disputes as "one of the curses of the labor world."

If the train porters are dissatisfied with their classification and desire to have the Brotherhood represent them, they must submit that question to the Mediation Board, which has been given exclusive jurisdiction by the Congress to determine all disputed questions with respect to classification and representation. This court has no jurisdiction to determine such questions. Title 45 U. S. C. A. Section 152 Ninth, supra. General Committee v. M-K-T R. Co., 320 U. S. 323.

The conclusion is inescapable that the contract would not have been entered into by the Trustee had it not been for the threat of strike. The economic results alone are convincing of that conclusion, because the members of the Brotherhood who, under the contract are to displace the porters, receive pay much in excess of that being paid the porters for performing less work.

As heretofore stated, the witness King, one of the officers of the carriers, who participated in the negotiations of the contract, stated that prior to March 7, 1946 the carriers desired to retain the services of the train porters; that it was only because of the threat of strike that the

contract was entered into, and that it was because of the contract prohibiting the performance of certain duties by the train porters that their jobs were abolished, and they were separated from the service. Even though the contract may have been signed by the Carrier as a result of a strike threat by the Brotherhood, if the Brotherhood owed the porters no duty to represent them, and had a right to contract with respect to functions to be performed by their own members, coercion would not void the contract. In view of the aforesaid, I am unable to find that the contract was void.

The next question concerns the contention of the carriers that the questions involved constitute a jurisdictional dispute and must be referred to the National Railroad Adjustment Board. Title 45 U. S. C. A. § 153 (i)[3] again Congress has conferred exclusive jurisdiction upon the National Railroad Adjustment Board to determine such questions, and this Court has no jurisdiction.

For a long period of time prior to the agreement of March 7, 1946 the performance of brakemen duties by train porters had been in dispute by the Brotherhood of Railroad Trainmen claiming for themselves the right to perform such functions. Whereas, on the contrary, the porters insisted, even as late as their attempted intervention before the Emergency Board, that they had a right to perform these duties. It therefore seems clear to me that there did exist a jurisdictional dispute; that the question must be submitted to the National Railroad Adjustment Board for determination, and that this court is without jurisdiction. General Committee v. M-K-T R. Co., 320 U. S. 323; General Committee, etc. v. M-K-T R. Co., 132 F. (2) 91; Order of Railroad Telegraphers, et al. v. N. O. T. & M. Ry. Co., 156 F. (2) 1.

If it were not for the rather unusual circumstances of this case, the court probably should dissolve the temporary

3 "(i) The disputes between an employee or [goup] of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes: * * *"

injunction and retain jurisdiction pending disposition of the questions by the Mediation Board and by the National Railroad Adjustment Board. Order of Railroad Telegraphers, et al. v. N. O. T. & M. Ry. Co., 156 F. (2) 1. But it seems to me that the unusual facts here do call for unusual procedure.

The Carriers insist that Title 45 U. S. C. A. § 152 Seventh[4] does not apply because there was no change in the pay, rules or working conditions of the porters as embodied in agreements. The contract of February 3, 1944 between the Brotherhood of [Trainment], Brakemen, Switchmen, Porters, Firemen & Railway Employees, Incorporated, and the Carriers carried the thirty day clause conforming to Section 152 Seventh, supra.

Title 45 U. S. C. A. § 156[5] provides for at least thirty days notice of any intent to change agreements affecting pay, rules and working conditions. It is true carriers seek to discharge all of the porters rather than change the rates of pay or rules under which they work, but the abolishment of their jobs and their discharge clearly result from the execution of the contract of March 7, 1946 taking from the porters certain functions and duties and bestowing them elsewhere.

It seems clear to me that prior to March 7, 1946 there did exist a jurisdictional dispute over the performance of the duties of brakemen by train porters, and that both

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4 "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

5 "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

under the contract between the train porters and the carriers, and under Section 152 Seventh, supra, and Section 156 supra, it was the duty of the carriers to give the statutory notice. This they did not do. Immediately following the signing of the contract of March 7, 1946 they notified all the porters of their separation from the service. Were it simply a labor dispute involving jurisdiction over certain functions or duties, probably a court of equity would be without jurisdiction to grant relief pending disposition of the question by the Administrative Boards.

Should the Mediation Board determine upon application that the porters have been improperly classified for purposes of representation, and that they should have been represented by the Brotherhood, or, if the National Railroad Adjustment Board should hold that under the contract with the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Incorporated, or because of long standing custom the porters, as such are entitled to perform the functions of brakemen, then clearly the plaintiff and his group will suffer irreparable injury through the loss of their jobs, for which they have no administrative remedy and no adequate remedy at law.

It is my opinion that the restraining order should be continued pending determination by the National Railroad Adjustment Board of the question of jurisdiction as to the performance of the functions of brakeman by the porters, and for a determination of the question of the classification and right or duty of representation by the Mediation Board, or for a reasonable time within which the plaintiff through his labor organization representative may invoke the jurisdiction of those Boards. It is so ordered.

Findings of Fact, Conclusions of Law and Decree may be submitted in accordance herewith.

(Signed) R. M. DUNCAN,
District Judge.

Dated this 1st day of August, 1947.

Findings of Fact.

1. Plaintiff is a resident and citizen of the State of Tennessee.

2. St. Louis-San Francisco Railway Company is a Missouri corporation with principal place of business in the City of St. Louis, Missouri.

3. Defendant, St. Louis-San Francisco & Texas Railway Company, is a Texas corporation and a subsidiary of the St. Louis-San Francisco Railway Company.

4. Defendant Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, debtor, under reorganization proceedings in this Court, is a resident of St. Louis, Missouri and citizen of the State of Missouri.

5. Defendant Brotherhood of Railroad Trainmen is a voluntary organization, limited to white brakemen, yardmen and conductors. The by-laws of the Brotherhood of Railroad Trainmen excludes Negroes from membership except in states in which such exclusion is forbidden by law and in those states the exclusion is successfully effected by means of the "Blackball". There are no Negro members of the Brotherhood of Railroad Trainmen. In the past, when Negroes have attempted to join that Brotherhood, they were not permitted to become members.

6. C. O. Carnahan is General Chairman of the Brotherhood of Railroad Trainmen, with headquarters in Springfield, Missouri.

7. Plaintiff, designated by Carriers as a "train porter", is employed by the St. Louis-San Francisco Railway Company.

8. Plaintiff is a member of the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., an organization composed entirely of Negroes employed in various capacities by carriers, and the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc., was the representative of the "train porters" in the negotiation of their wage agreements mentioned in the evidence.

9. Plaintiff has about thirty-three years service with the St. Louis-San Francisco Railway Company. During the earlier part of the time he was employed as a freight brakeman, but in 1917 transferred to the position of "train porter" when injuries received rendered him physically incapable of doing a freight brakeman's work.

10. For approximately forty years (except for a time beginning December 2, 1918, while the railroads were under the United States Railroad Administration during World War I, and thereafter until February 1, 1921) the carriers have designated plaintiff and the class he represents as "train porters", although in accordance with custom or orders of their employers they performed some or all of the duties of head end brakemen on passenger trains; ie., they assisted in the operation of the train, received and transmitted orders to the conductor, engineer and fireman, threw switches, flagged trains and performed such other duties as the conductor in charge of the train assigned them. During the World War I period, the United States Railroad Administration designated them as "passenger brakemen".

11. For many years Negroes alone have been used as "train porters". In spite of the fact that they have performed the duties of a head end passenger brakeman and further have been required to keep the coaches clean in transit and assist the passengers off and on trains; their pay has been substantially less (except during World War I period as noted below) than that of white brakemen serving on the same job, who have not been required to clean the cars or assist passengers.

12. On December 2, 1918, William G. McAdoo, Director General of Railroads, issued an order pertaining to duties then and since performed by "train porters", reading as follows:

> "To carry out the intent of Article VI, General Order No. 27, and retroactive to June 1, 1918, it is ordered:
>
> "1. Employees in a passenger train crew, except conductor, collector and baggagemaster, qualified and

regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly.

"(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

"(b) Use hand and lamp signals for the protection and movement of trains.

"(c) Open and close switches.

"(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

"(e) Compare watches when required by rule.

"2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

"3. This order shall not curtail the duties of employees heretofore classed as 'train porters'.

"4. This order shall not infringe upon the seniority rights of white trainmen.

W. G. McADOO
Director General of Railroads."

13. As a result of the above order which continued into effect until February 1, 1921, the Negro "train porters" were designated as "passenger brakemen" and given brakemen's pay on an equal basis with the white brakemen. However, as of that date the railroads redesignated them as "train porters" and imposed substantial reductions in pay but left their duties untouched.

14. The "train porters" were unorganized and without representation as a group prior to 1921. The first organization of "train porters" then came into existence to try to obtain relief against the aforesaid change in classification and reduction in wages. On February 2, 1944, the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc. (BTBPSF&R Employees, Inc.), a Negro labor organization, signed a collective bar-

gaining agreement with the carriers for the "train porters". Subsequent contracts were negotiated by the BTRPSF&R Employees, Inc., on September 22, 1944, and July 31, 1946, the latter specifically providing that it was signed without prejudice to this action.

15. For twenty-five years, before the Brotherhood of Railroad Trainmen-Frisco contract of March 7, 1946, infra, was signed, the "train porters" had been treated by the carriers as a separate class for representation purposes. The formation of the different organizations which the "train porters" joined from time to time for purposes of representation was actuated by motives of necessity because they were not represented by or admitted to membership in the standard railroad labor organizations.

16. For a long period of time, there was a controversy between the Brotherhood of Railway Trainmen and the Carriers concerning the performance of so-called brakemen's duties by "train porters"; the Brotherhood claiming such work for the white brakeman.

17. There was also a long standing dispute between the four operating brotherhoods (Brotherhood of Railroad Trainmen, Order of Railway Conductors, Brotherhood of Locomotive Engineers, and Brotherhood of Locomotive Firemen and Enginemen) and the Carriers over the use of Negroes in train, engine and yard service. This culminated in an agreement March 14, 1928, whereby the Carrier agreed that "in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed." The four train service organizations therein recognized the right of Negroes then in service to the positions they were entitled to under schedule rules and undertook to protect them from unfair action by any union member aimed at compelling them to abandon these positions or their elimination from employment.

18. On December 21, 1945, the Brotherhood caused to be spread among its members employed in the train and yard service of Carriers, a strike ballot including twelve cases. Case No. 3 read:

"Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF & Tex. Railway Co. and claim that additional brakemen covered by and paid under the respective brakemen agreements should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945 be sustained."

19. Defendant C. O. Carnahan as General Chairman of the Brotherhood, advised C. P. King, Assistant to Chief Operating Officer of the Carriers, by letter dated Jan. 3, 1946:

"You are hereby notified that a strike of yard and road service employees under the jurisdiction of the Brotherhood of Railroad Trainmen will be effective 6:00 p. m., Sunday, January 6, 1946."

20. Pursuant to a request by the Carriers, an Emergency Board was created by the President of the United States, under authority set out in Title 45 U. S. C. A., Section 160. The Board held hearings in the City of St. Louis, Mo. Train porters, acting through the BTBPSF&R Employees, Inc., made application to intervene in the proceeding before said Board, but their application was denied. A motion for reconsideration of the denial of their petition was also denied.

21. The Emergency Board, in its report to the President of the United States, recommended with respect to Case No. 3 that it with others be "processed for submission to the National Railroad Adjustment Board in the event they cannot be disposed of satisfactorily on the property."

22. Negotiations between the Brotherhood and the Carriers thereafter continued, culminating in a contract on March 7, 1946, providing that "effective April 1, 1946, the practice of train porters performing work generally recognized as brakeman's duties will be discontinued. Claims of certain brakeman who were available for the date of August 2, 1945, where claims have been submitted to be paid." The evidence indicated that this contract was entered into by the Carriers reluctantly, and as a result of the strike threats.

23. At no time were the "train porters" represented during the negotiations.

24. The "train porters" were performing their duties in an efficient manner and no complaint was expressed against them by their employers. The Carriers having determined that it would be economically unsound to continue the use of "train porters" if they were not permitted to perform the functions of a head end brakeman, notified all "train porters" on March 9, 1946, that the position of train porters would be abolished on April 1, 1946. The Brotherhood did not expressly demand the discharge of the "train porters".

25. On March 14, 1946, plaintiff was personally notified by the carriers his job would be terminated April 1, 1946, and to turn in his switch keys, lanterns, markers and other brakeman's equipment. A head end brakeman's job was bulletined on his run to be bid in by white brakemen. Other train porters received similar notices and their runs were likewise bulletined to be bid in by white brakemen. Thereupon, plaintiff instituted this suit.

26. The notices of March 9, 1946 and of March 14, 1946, notifying the train porters of their separation from their jobs resulted from a change in the rules and working conditions under their contract of employment.

27. The defendant carrier did not give thirty days' notice to the train porters as provided by Section 156, Title 45, U. S. C. A.

R. M. DUNCAN,
District Judge.

Conclusions of Law

1. The Court has no jurisdiction to determine the question whether the "train porters" should be classified as brakemen and represented by the Brotherhood of Railroad Trainmen.

2. The National Mediation Board has been given exclusive jurisdiction by Congress to determine all disputed

questions with respect to classification for purposes of representation under the Railway Labor Act.

3. There is a jurisdictional dispute between the Brotherhood of Railroad Trainmen and the "train porters" as to who is entitled to perform the functions of head end brakemen on passenger trains. Congress has conferred exclusive power on the National Railroad Adjustment Board to determine jurisdictional disputes.

4. It was the duty of the carriers under their agreements with the "train porters" and under the Railway Labor Act (sections 2-Seventh and 6) (45 U. S. C., section 152-Seventh and 156) to give the "train porters" thirty days' notice of the contemplated change in their working conditions as a class, and the Carriers should be permanently enjoined from abolishing the position of "train porters" under the Notices of March 9, 1946 or March 14, 1946.

R. M. DUNCAN,
District Judge.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Simon L. Howard, Sr.,
Plaintiff,
vs.
Frank A. Thompson, Trustee et al.,
Defendants.
No. 4452,
Div. No. 2.

Order.

Now on this day, this cause having heretofore been heard and submitted, and the Court being fully advised in the premises, and having filed findings of fact and conclusions of law herein, doth order and adjudge and decree that the defendant St. Louis-San Francisco Railway Company, a corporation, be and it is enjoined from carry-

ing into effect the notices of March 9, 1946 and March 14, 1946 abolishing the position of train porters for its system; that the restraining order heretofore entered be and is dissolved and of no further force and effect; that further proceedings herein be stayed for a reasonable time in which the plaintiff may proceed before the National Railroad Labor Adjustment Board and the National Mediation Board for a determination of the claims asserted by him, the Court retaining jurisdiction hereof until further order.

RICHARD M. DUNCAN,
District Judge.

August 18, 1948.

Motion for New Trial, Containing Exceptions to Findings, Conclusions, Judgment and Order.

Now comes Plaintiff and files this Motion for New Trial containing Exceptions to Findings, Conclusions, Judgment and Order, entered herein August 18, 1948, for the following reasons:

I. Plaintiff and others similarly situated have no adequate or available administrative remedy under the Railway Labor Act (Steele v. L. & N. R. R. Co., 323 U. S. 192) for protection of their rights.

II. The National Mediation Board lacks jurisdiction in the premises. (See Exception to Conclusion No. 2.)

III. The National Railroad Adjustment Board lacks jurisdiction to give complete relief in the premises.

IV. The First Division of the National Railroad Adjustment Board has exclusive jurisdiction under the Railway Labor Act over disputes between carriers and trainmen and train-service employees, but of the ten members who constitute the First Division, there are:

(a) Five labor members who come one each from the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and

the Order of Railway Conductors—all of which unions exclude Negroes from membership solely because of color.

(b) The Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors have a record in this case of more than twenty years implacable hostility toward the employment of Negroes in train- and yard-service on the St. Louis-San Francisco Railroad Company, and for that reason their representatives are disqualified to sit on any dispute wherein the Negro passenger brakemen are complaining about illegal curtailment of their job rights by the St. Louis-San Francisco Railroad Company. The record shows both of the foregoing defendants were parties to and have given effect to the restrictive agreement of March 14, 1928, and the Brotherhood of Railroad Trainmen even during the war years did not permit any deviation from its narrow terms.

(c) Both the defendant St. Louis-San Francisco Railroad Company and the defendant Brotherhood of Railroad Trainmen have each one representative on the First Division who would hear and sit in judgment on any complaint of plaintiff against the St. Louis-San Francisco Railroad Company and the Brotherhood of Railroad Trainmen, and the action of this Court compels plaintiff to submit his case for decision to parties against whom he complains.

(d) The entire membership of the First Division is composed of white persons; that all white employees of the St. Louis-San Francisco Railroad Company in train- and yard-service are eligible to participate at some stage in the selection of the five labor members on the First Division, whereas plaintiff and all the Negro passenger brakemen on the Frisco are barred solely because of race from participating at any stage in the selection of any of the five labor members of the First Division.

(e) Even if the objections stated above to the First Division did not exist, still the First Division is so far behind in its docket (2800 cases pending and 2 years behind in its docket) that the delay in enforcing plaintiff's right by reference to the First Division would work irreparable injury upon him and others similarly situated and amount to a denial of right and confiscation of property without due process or equal protection of law.

V. Plaintiff excepts to the Findings of Fact referred to in the Order filed August 18, 1948 because they do not contain all the ultimate material facts in the record to sustain material legal conclusions. They should be amended to include essential findings as follows (or language to same effect):

(a) The record shows that the defendant carrier has consistently given effect to the restrictive agreement of March 14, 1928, and has denied new job opportunity to Negroes in the train service except under the nomenclature of train-porters or chair-car porters.

(b) The record shows that Division No. 1 of the National Railroad Adjustment Board, which has jurisdiction over train service and operating employees, has 10 members, 5 of whom (the labor representatives) come from unions which bar Negroes from membership; and 4 of said unions: the Brotherhood of Railroad Trainmen, Order of Railway Conductors, Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen & Enginemen are already on record in the Agreement of March 14, 1928, as opposed to the employment of Negroes in train, engine or yard service on the defendant carriers, except as train porters. Furthermore, the record shows that an employee of the defendant carrier is one of the five carrier representatives of said division.

(c) The record shows that white brakemen have run interchangeably with "train porters" as head end brakemen, and on certain runs or occasions have performed all the extra functions of some "train porters" including the assistance of passengers, distribution of pillows, handling of baggage and removal of litter.

VI. Plaintiff excepts to the following conclusions referred to in the Order filed August 18, 1948.

(a) Conclusion No. 1 because contrary to law under the facts in this record.

(b) Conclusion No. 2 because erroneous and misleading. The National Mediation Board has been given exclusive jurisdiction by Congress to determine questions with respect to classification *only* in connection with *election* disputes for purposes of representation.

(c) Conclusion No. 3 because erroneous and because it is inconsistent with Conclusions 1 and 2. Under Conclusions 1 and 2 the position of the Court is that it cannot determine whether the Negro "train porters" are a separate craft but must wait the determination of that issue by the National Mediation Board. A jurisdictional dispute within the meaning of Order of Railway Conductors v. Pitney, 326 U. S. 561, and other cases can exist only between separate crafts. Therefore, the Court cannot conclude there is a jurisdictional dispute between the "train porters" and the Brotherhood of Railroad Trainmen unless and until, on its own theory, the National Mediation Board has first determined that the "train porters" and brakemen are separate crafts, and not component parts of a single craft with a single collective bargaining representative.

Furthermore, the National Railroad Adjustment Board has not been empowered to determine disputes of this character, and even if so empowered could not, in this instance, as pointed out above, give fair and impartial administrative relief to Negroes.

VII. The Conclusions of Law should be amended to include the following (or language to same effect):

(a) The Court has jurisdiction under the unusual circumstances in this matter to determine the question of whether the plaintiff and [other] similarly situated should be represented by the Brotherhood of Railroad Trainmen.

(b) The Brotherhood of Railroad Trainmen as the statutory bargaining agent for the entire craft of brakemen violated its obligations to faithfully represent all members of that craft, irrespective of race, in seeking to take away the job functions of plaintiff and other Negro brakemen, for the benefit of white men. (Steele v. L. & N. R. R., 323 U. S. 192.)

(c) The conclusion is inescapable that the contract of March 7, 1946, would not have been entered into if not for the Brotherhood's threat of a strike. The Brotherhood threatened to strike in spite of the fact the Emergency Board convened by the President of the United States recommended that it first refer the dispute to National Railroad Adjustment Board in accord with the decision of the United States Supreme Court in Order of Railway Con-

ductors v. Pitney (326 U. S. 561). This the Brotherhood refused to do and instead of choosing a lawful administrative solution, served notice of date and hour of the threatened strike. Since the contract was signed by the Carriers under duress caused by a strike threat by the Brotherhood, even if the Brotherhood owed the porters no duty to represent them and had a right to contract with respect to functions to be performed by their own members, coercing the discharge of other employees under such circumstances voids the contract.

(d) The threatened abolition of the jobs of the "train porters" and discharge were caused by the execution of the contract of March 7, 1946, taking from them their main functions and duties and bestowing them on the white brakemen, members of the Brotherhood, and the Brotherhood must be held to have intended the natural consequences of its acts.

(e) The effect of the action of the Brotherhood of Railroad Trainmen forcing the carrier to sign the Agreement of March 7, 1946 amounted to deprivation of the jobs of Negroes solely because of their race or color.

(f) The Agreement of March 7, 1946 violates the public policy of the United States, is an illegal interference with plaintiff's contract rights and of others similarly situated, through duress and coercion, and is therefore void.

(g) Plaintiff and other so called "train porters" are passenger brakemen in fact and the Brotherhood of Railroad Trainmen as collective bargaining agent under the Railway Labor Act for all brakemen on the Frisco lines was under a statutory duty to represent plaintiff and the other train porters for collective bargaining purposes without hostile discrimination.

(h) Neither the National Mediation Board nor the Railway Adjustment Board can give plaintiff and others similarly situated necessary relief. In addition, the First Division of the National Railway Adjustment Board could not give a fair hearing, even if it had administrative jurisdiction over all of the subject matter because of the affiliations of its labor members, and the presence of the representative of the defendant carrier.

(i) The plaintiff and others similarly situated would suffer irreparable injury and damage without the aid of a court of equity and have no adequate remedy at law. Furthermore, the acts complained of are prejudicial to the public interest as well as to private rights of Negroes as citizens under Title VIII, U. S. C. Sec. 41 and the Constitution of the United States.

(j) A permanent injunction should issue restraining the defendant carriers from discharging plaintiff and others similarly situated, by virtue of the agreement entered into with the Brotherhood of Railroad Trainmen on March 7, 1946, and from hiring white brakemen to replace or displace plaintiff and others similarly situated as planned in accordance with said agreement.

(k) A permanent injunction should issue restraining the Brotherhood of Railroad Trainmen and its members from making any claims under the Agreement of March 7, 1946, or enjoying the benefits of such illegal agreement.

(l) A permanent injunction should issue to restrain the carriers from recognizing any rights or claims under the Agreement of March 7, 1946.

VIII. So much of the Memorandum Opinion of the Court and Order of August 18, 1948 as is inconsistent herewith should be corrected, and a new Order and Opinion entered in accordance with the suggested amended Findings and Conclusions.

Oral argument is requested in connection with this Motion because of the far-reaching importance of the issues.

HENRY D. ESPY,
VICTOR PACKMAN,
Attorneys for Plaintiff,
1096 Arcade Building,
St. Louis 1, Missouri.

CHARLES H. HOUSTON,
Of Counsel,
615 "F" Street N. W.,
Washington, D. C.

Motion of Defendant Carriers to Amend Findings and Order and for New Trial.

I.

Defendant moves the court to amend its findings of fact and conclusions of law and order entered herein on the 18th day of August, 1948, in the following particulars:

1. By striking out Finding of Fact No. 7 and making the following in lieu thereof:

> Plaintiff and those in whose behalf he brings this suit are train porters employed by St. Louis-San Francisco Railway Company.

2. By striking out Finding of Fact No. 10 and making the following in lieu thereof:

> For approximately forty years (except for a time beginning December 2, 1918, while the railroads were under the United States Railroad Administration during World War I, and thereafter until February 1, 1921) plaintiff and the class he represents have been known as "train porters," although in accordance with custom or orders of their employers they performed some or all of the duties of head end brakemen on passenger trains; i. e., they assisted in the operation of the train, received and transmitted orders to the conductor, engineer and fireman, threw switches, flagged trains and performed such other duties as the conductor in charge of the train assigned them. During the World War I period, the United States Railroad Administration designated them as "passenger brakemen."

3. By striking out Finding of Fact No. 11 and making the following in lieu thereof:

> For many years Negroes alone have been used as "train porters." In spite of the fact they have performed the duties of a head end passenger brakeman and further have been required to keep the coaches clean in transit and assist the passengers off and on

trains, their pay has been substantially less (except during World War I period as noted below) than that of white brakemen, who have not been required to clean the cars or assist passengers.

4. By striking out Finding of Fact No. 13 and making the following in lieu thereof:

This order continued in effect until February 1, 1921, although the title "train porters" continued to be recognized by carriers and Negro train porters were given pay on an equal basis with white brakemen. Effective February 1, 1921, the carriers reduced the rate of pay of train porters materially below that which they had been receiving under the Director-General's order, although their duties remained the same.

5. By striking out Finding of Fact No. 14 and making the following in lieu thereof:

The "train porters" were unorganized and without representation as a group prior to 1921. The first organization of "train porters" then came into existence to try to obtain relief against the aforesaid reduction in wages. On February 2, 1944, the Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees, Inc. (BTBPSF&R Employees, Inc.), a Negro labor organization, negotiated and signed an agreement with the carriers covering rates of pay, separate seniority rosters of train porters and chair-car porters, and in a limited way the duties to be performed by train porters. Article II Rule 2 of said contract provides:

"Porters when on duty will be under the jurisdiction of conductor and will perform such duties as may be required."

Article X Rule 27 provided:

"Train porters will load and unload train boxes, clean and fill lamps and perform such other duties as may be assigned to them by proper authority."

Rules of the Transportation Department define duties of all trainmen, including train porters and they were required to pass a physical examination, carry standard watches, etc.

Subsequent contracts were negotiated by the BTBPSF&R Employees, Inc. on September 22, 1944, and July 31, 1946, the latter specifically providing that it was without prejudice to this action.

6. By striking out Finding of Fact No. 24 and making the following in lieu thereof:

The "train porters" were performing their duties in an efficient manner and no complaint was expressed against them by their employers. The Carriers having determined that it would be economically unsound to continue the use of "train porters" if they were not permitted to perform the functions of a head end brakeman, notified all "train porters" on March 9, 1946 of the agreement entered into with the Brotherhood of Railroad Trainmen on March 7, 1946, and that under that agreement, effective April 1, 1946, the train porters' positions would be discontinued. The Brotherhood did not expressly demand the discharge of the "train porters."

7. By striking out Finding of Fact No. 26 and making the following in lieu thereof:

"The notices of March 9, 1946, and of March 14, 1946, notifying train porters that their positions would be discontinued resulted solely from the agreement entered into on March 7, 1946, between Brotherhood of Railroad Trainmen and defendant carriers.

8. By striking out Finding of Fact No. 27 and making the following in lieu thereof:

The defendant carriers did not give thirty days' notice to the train porters.

9. By striking out Conclusion of Law No. 4.

10. By amending the order so that the same will read as follows:

Now on this day, this cause having heretofore been heard and submitted, and the Court being fully ad-

vised in the premises, and having filed findings of fact and conclusions of law herein, doth order and adjudge and decree that the restraining order heretofore entered be and is dissolved and of no further force and effect; and that the proceedings herein be dismissed.

II.

Defendant also moves the court to set aside the findings of fact, conclusions of law, judgment and order entered herein on said 18th day of August 1948, and grant defendant a new trial on the grounds that:

1. The court erred in ruling that it was the duty of the carriers under their agreements with the "train porters" and under the Railway Labor Act (sections 2—Seventh and 6) (45 U. S. C., section 152—Seventh and 156) to give the "train porters" thirty days' notice of the contemplated change in their working conditions as a class, and that the carriers should be permanently enjoined from abolishing the position of "train porters" under the Notices of March 9, 1946 and March 14, 1946.

2. That order is contrary to law in that it seeks to enjoin defendant carriers from carrying into effect the notices of March 9, 1946 and March 14, 1946, discontinuing the position of train porters for its system and in not dismissing the proceedings.

3. The effect of the order is to invalidate the contract of March 7, 1946, between the Brotherhood of Railroad Trainmen and carriers, which the court itself heretofore has held not invalid (72 F. Supp. 695, 702).

4. The court lacks jurisdiction over the subject matter and over the parties.

III.

Oral argument of these motions is requested.

M. G. ROBERTS,
S. G. RAY,
A. J. BAUMANN,
Attorneys for Carriers.

Statements of Reasons in Support of Motion of Defendant Carriers to Amend Findings and Order for New Trial.

The paragraphs herein are numbered to conform to the paragraphs in the motion to which they respectively relate.

I.

1. Finding of Fact No. 7 should be changed to reflect the fact that this is a class suit and to eliminate the statement that plaintiff was "designated" a train porter by carriers. Employees have the right to organize and bargain collectively through representatives of their own choosing without interference, etc. by the employer. Such representative is chosen by the majority of the craft or class.

45 U. S. C. A. 152, Third, Fourth.

2. Finding of Fact No. 10 should be changed to conform to the Court's opinion herein to the effect that employees were known as "train porters" for approximately forty years, even during the period the Order of December 12, 1918, by the Director General of Railroads was in effect.

Howard v. Thompson, 72 F. Supp. 695, 698.

3. Finding of Fact No. 11 should be changed to eliminate the words "serving on the same job". The "jobs" of brakemen and train porters are not the same.

4. Finding of Fact No. 13 should be changed to conform to the facts stated in the Court's opinion herein.

Howard v. Thompson, 72 F. Supp. 695, 698.

5. Finding of Fact No. 14 should be enlarged to show that the agreement between the carrier and the train porters' union covered rates of pay, separate seniority rosters of train porters as well as chair-car porters, to quote certain pertinent portions of those contracts, and to make reference to the rules of the Transportation Department of carriers as was done in the Court's opinion herein.

Howard v. Thompson, 72 F. Supp. 695, 698-699.

6. Finding of Fact No. 24 should be amended to state more fully the tenor of the notices.

7. Finding of Fact No. 26 includes a conclusion of law. If any finding is to be made respecting these notices and why they were given, it should be as stated in the attached motion.

Howard v. Thompson, 72 F. Supp. 695, 702.

8. Finding of Fact No. 27 includes a conclusion of law. If any reference is necessary or material that thirty days did not elapse between March 9, 1946 and April 1, 1946, and the carriers contend it is not, then the findings of fact should contain the simple statement as shown in the attached motion.

9. Conclusion of law No. 4 should be stricken. No change in the "rates of pay, rules or working conditions" of train porters as a class "as embodied in agreements" is involved here, and consequently carriers were not required to give "thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions".

45 U. S. C. A., 152, Seventh; 156.

Order of Railroad Telegraphers et al v. New Orleans, Texas & Mexico Ry. Co., et al, 156 F. 2d 1, 4-5, cer. den. 329 U. S. 758, reh. den., 329 U. S. 829.

These notices were withdrawn pursuant to the temporary restraining order and this matter has become moot.

14 Am. Jur. § 59, p. 277-278. Injunctions, 28 Am. Jur. § 296, p. 468, § 327, l. c. 499-500.

Singer Manufacturing Company v. Wright, 141 U. S. 696.

United States v. Hamburg-American Co., 239 U. S. 466.

Standard Oil Co. v. United States, 283 U. S. 163.

10. The order should be amended as set out in this, the attached motion, since the matters under consideration herein are properly for consideration by National Mediation Board or National Railroad Adjustment Board under the Railway Labor Act.

General Committee, etc. v. M-K-T R.R. Co., et al, 132 F. 2d 91, 94; 320 U. S. 323, 334-335.

Order of Railway Conductors v. Pitney et al, 66 S. Ct. 322.

M-K-T R. Co. v. Randolph, 164 F. 2d 4, cer. den. 68 S. Ct. 1083.

II.

1. See paragraph 9 of Article I hereof.

2. See paragraph 9 of Article I hereof.

3. In the Court's opinion herein, 72 F. Supp. 695, 702, this Court stated that, with respect to the agreement of March 7, 1946, that it "was unable to find the contract was void".

4. The Court has no jurisdiction.

General Committee, etc. v. M-K-T R.R. Co., et al, 132 F. 2d 91, 94; 320 U. S. 323, 334-335.

Order of Railway Conductors v. Pitney, et al, 66 S. Ct. 322.

Missouri-Kansas-Texas Railroad Co. v. Randolph, 164 F. 2d 4, cer. den. 68 S. Ct. 1083.

Order of Railroad Telegraphers, et al v. N. O. T. & M. R. Co., et al, supra.

III.

Because of the importance of the issues involved, defendant carriers urge the granting of an oral argument herein.

M. G. ROBERTS,
S. G. RAY,
A. J. BAUMANN,
Attorneys for Carriers.

Transcript of Hearing on Plaintiff's Motion for New Trial, Containing Exceptions to Findings, Conclusions, Judgment and Order, and Motion of Defendant Carriers to Amend Finding and Order and for New Trial.

Be It Remembered, That on Friday, September 17, 1948, at eleven o'clock, a. m., the above entitled motions came on regularly for hearing before the Honorable Richard M. Duncan, District Judge.

Appearances:

The Plaintiff was represented by Messrs. Victor Packman and Henry D. Espy, his attorneys.

The Defendant, St. Louis-San Francisco Railroad Company, was represented by Messrs. A. J. Baumann and S. G. Ray, its attorneys.

The Defendant, Brotherhood of Railroad Trainmen, was represented by Mr. Charles R. Judge, its attorney.

Whereupon, the following proceedings were had and entered of record:

The Court: All right, gentlemen. All right, Mr. Packman:

Mr. Packman: Do you want to lead off, Mr. Baumann?

Mr. Baumann: You may lead off, Mr. Packman.

Mr. Packman: If Your Honor please, the Memorandum Opinion was filed in this matter I believe in August of 1947 before the rules of civil procedure amendments with reference to findings of fact and conclusions of law had been amended. There was some controversy as to just when those new rules would become effective, but it was generally agreed that in the year 1948 they would be.

The Court: They became effective the 1st of March, 1948; that is my recollection.

Mr. Packman: Yes, Your Honor.

The Court: I think that is right.

Mr. Packman: With reference to Rule 52, the amendment seemed to imply that if an opinion or memorandum decision is filed it would be sufficient that the findings of fact and conclusions of law appear therein, but the rule did not clarify whether that referred to opinions filed before the effective date of the amendment or whether it referred only to those which were filed thereafter.

In any event, the reason I called attention to that is that even if findings of fact and conclusions of law separately would not be necessary by virtue of the amendments, it is our view that the Memorandum Opinion contained fact findings which were not consistent in many respects with the record.

It was a long drawn out trial. It took a long time after the hearing before the briefs were in and there were some depositions which were not physically read at the time of the trial, although there was some reference to them. It may be that in the course of the review of the evidence that some facts which were not too clearly presented could have become distorted. Finally, findings of fact and conclusions of law and a formal order were signed by Your Honor and in due course both the Carriers and the Plaintiff filed exceptions, motions for new trial.

I shall take up first our motion for new trial. The first objection we have is that the conclusions of the Court did not follow our theory that we have no adequate or available administrative remedy under the Railway Labor Act. I shall touch upon that subsequently when we discuss conclusions of law, which we think are more consistent with the law than the findings and conclusions as they appear, and they are still, shall we say, in the interlocutory state. I believe Your Honor, at least to the extent that we can point out some inaccuracies or inadequacies, will make changes.

Our second point, which is really a breakdown of the first, is that the National Mediation Board lacks jurisdiction in the premises. We direct Your Honor's attention to our exception to conclusion No. 2.

The third point we make is that the National Railroad Adjustment Board lacks jurisdiction to give complete relief in the premises. By way of a further clarification of that point we, for the first time, articulate in one place,

and shall we say in summary form give all the reasons why the First Division of the National Railroad Adjustment Board cannot give us any administrative relief here.

We point out that five labor members who come one each from the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and the Order of Railway Conductors, all of which unions exclude Negroes from membership solely because of color.

Then we stress that the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors have a record in this case of more than twenty years inplacable hostility toward the employment of Negroes in train and yard-service on the St. Louis-San Francisco Railroad Company, and for that reason their representatives are disqualified to sit on any dispute wherein the Negro passenger brakemen are complaining about illegal curtailment of their job rights by the St. Louis-San Francisco Railroad Company. The record shows both of the foregoing defendants were parties to and have given effect to the restrictive agreement of March 14, 1928 —that reference is to the St. Louis-San Francisco Railroad Company and the Brotherhood of Railroad Trainmen—and the Brotherhood of Railroad Trainmen even during the war years did not permit any deviation from its narrow terms.

The record, if Your Honor will recall, shows that Mr. King testified that during the war correspondence was had wherein because of a man-power shortage a request was made to permit Negroes to be hired for certain other functions and the Brotherhood said under no conditions would they permit Negroes to be hired.

Then we point out that both the defendant St. Louis-San Francisco Railroad Company and the defendant Brotherhood of Railroad Trainmen have each one representative on the First Division who would hear and sit in judgment on any complaint of plaintiff against the St. Louis-San Francisco Railroad Company and the Brotherhood of Railroad Trainmen, and the action of this Court compels plain-

tiff to submit his case for decision to parties against whom he complains.

The entire membership of the First Division is composed of white persons; that all white employees of the St. Louis-San Francisco Railroad Company in train and yard-service are eligible to participate at some stage in the selection of the five labor members on the First Division, whereas plaintiff and all the Negro passenger brakemen on the Frisco are barred solely because of race from participating at any stage in the selection of any of the five labor members of the First Division.

Even if the objections stated above to the First Division did not exist, still the First Division is so far behind in its docket—2800 cases pending and two years behind in its docket—that the delay in enforcing plaintiff's rights by reference to the First Division would work irreparable injury upon him and others similarly situated and amount to a denial of right and confiscation of property without due process or equal protection of law.

In that connection Your Honor recognized that there were unusual circumstances in this case and in the Memorandum Opinion ruled that in the interim that the status quo of the men's jobs should be adequately protected by an injunction and Your Honor followed the dissenting opinion in the Pitney case. It is true that that isn't the force, but the common sense of what Judge Rutledge had to say must appeal to men of intelligence and there is nothing in the majority opinion to the contrary; it is merely an amplified thought that if men have to be relegated to an administrative tribunal, assuming that it is so constituted it can decide the issues, until the time they finally get to first base and there is a ruling on it, if the men are going to suffer irreparable injury and damage a court of equity should protect, and in that connection I want to call Your Honor's attention to a decision, that of Railroad Employees Coop. Association vs. Atlanta B. & C. R., 22 Fed. Sup. 510, that is the District Court of the District of Georgia, District Judge Underwood. I traced this in a citator and it has not been criticized or reversed.

In that case the court held that an injunction should be maintained pending the utilization by the parties of their rights, and as the court found they should proceed before

the Mediation Board, but in the interim the court found that without the injunction they would suffer irreparable injury and damage and found that such an order should be issued.

Now, particularly in the case such as this where we challenge the validity of any decisions that the administrative body, the Adjustment Board could give to us, it would be a fatal thing if these men would lose their jobs and not have any proper interim protection by injunctive relief. So in a case of this character, where there are such unusual circumstances, the form of the order certainly should be such that the men will not be prejudiced.

The next point that we make in our motion for new trial is that the Plaintiff excepts to the findings of fact referred to in the order filed August 18, 1948 because they do not contain all the ultimate material facts in the record to sustain material legal conclusions.

Now, it is true that under the amendment to Rule 52, and if that prevails, that separate findings of fact and conclusions of law need not be made by the Court, but that is on the supposition and presumption that the Memorandum Opinion which could be used in the alternative is meticulous enough so that a reviewing court would have a basis for determining whether or not a lower court ruled correctly on the detailed evidence in the record.

I don't think there was any case in recent years which probably has a larger record or which was harder fought than that of the United States vs. the Aluminum Company of America. This particular decision in 44 Fed. Sup. 97 of the District Court takes up about 200 pages in the reported case. Under Point 74, the Judge tells about his difficulties in trying to do justice in the matter and comes to the conclusion that under the ruling of the Supreme Court in the Interstate Circuit Case, Interstate Circuit vs. United States, which pertained to Equity Rule 70.5 which was carried over in the rules of civil procedure 52 that it requires meticulous findings.

Now, if separate findings of fact and conclusions of law have to be meticulous, certainly where the Memorandum Opnion might be referred to in lieu of findings of fact and conclusions of law insofar as they pertain to fact issues, they should be meticulous too.

For that reason we think we are not asking for too much if the findings of fact are amended to include other ultimate material facts in the record to sustain material legal conclusions; and if the difficulty presented to the Court is that in finding these facts it might lead to a different legal conclusion, then the correct thing to do would be to alter the legal conclusions, which I still think are tentative in a sense that it is still within the breast of the Court, there is no final order, and if Your Honor has overlooked some material facts which should lead to some modification to the legal conclusions or amplification, that problem should not be as serious as that of overlooking meticulous findings, which we think are required.

Here is one of the items we think should be included based on the record:

The record shows that the defendant carrier has consistently given effect to the restrictive agreement of March 14, 1928, and has denied new Job opportunities to Negroes in the train service except under the nomenclature of train porters or chair-car porters.

The record shows that Division No. 1 of the National Railroad Adjustment Board, which has jurisdiction over train service and operating employees, has 10 members, 5 of whom, the labor representatives, come from unions which bar Negroes from membership; and 4 of said unions, the Brotherhood of Railroad Trainmen, Order of Railway Conductors, Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen & Enginemen, are already on record in the Agreement of March 14, 1928, as opposed to the employment of Negroes in train, engine or yard service on the defendant carriers, except as train porters. Furthermore, the record shows that an employee of the defendant carrier is one of the five carrier representatives of said division.

In suggesting these additional findings, we do not ask that the Court adhere necessarily to our dictum which might be faulty or which may not necessarily be properly phrased, but what we really ask for is findings containing the substance or language of the same effect.

Another proposed finding which we believe is borne out by the record is that the record shows that white brakemen have run interchangeably with "train porters" as head end brakemen, and on certain runs or occasions have

performed all the extra functions of some "train porters" including the assistance of passengers, distribution of pillows, handling of baggage and removal of litter.

Those are the few additional findings of fact which we think are sustainable by testimony in the record and which ought to be contained in a complete meticulous set of findings.

Now, with reference to the conclusions—and they are very short—the Court found four of them and we except to three of them, the first three, and these are our reasons:

Conclusion No. 1, which is to the effect that the Court has no jurisdiction to determine the question whether the "train porters" should be classified as brakemen and representatives by the Brotherhood of Railroad Trainmen, we except to that because of the unusual circumstances which the Court recognized exists in this case wherein we believe there is no adequate administrative remedy, unless the Court would come to the conclusion that there is a hiatus in the law and that nobody can give relief, which would be quite a reflection on the rule in equity where there is no adequate remedy at law that a court of equity should give relief.

The next one, which pertains to Conclusion No. 2 which is to the effect that the National Mediation Board has been given exclusive jurisdiction by Congress to determine all disputed questions with respect to classification for purposes of representation under the Railway Labor Act, we except to because we believe it is erroneous and misleading.

It is our view, based upon the reading of the cases, that the National Mediation Board has been given exclusive jurisdiction by Congress to determine questions with respect to classification only in connection with election disputes for purposes of representation; and our search of the records of the National Mediation Board and of the reported cases show of no instance wherein an issue such as this was ever accepted by the Mediation Board as within the scope of its authority, and the fact we pointed out in the brief referred to some controversial issues involving the National Mediation Board, that Board took the view which is supported by the testimony of Mr. Cole, as Secretary of the Board, which appears in a deposition here offered by the Brotherhood, that the Mediation

Board does not have jurisdiction in all matters, and particularly the cases seem to sustain their jurisdiction with reference to determining who belongs to a craft only when the issue is who is the proper representative in an election dispute.

Now, we have no such dispute here, and if we go to the Mediation Board we believe that it will just be an extra expense and that it will be a futility.

However, with reference to Conclusion No. 3, we sense that there is an inconsistency between Conclusions 1 and 2 and 3, because in No. 3 the Court states, "There is a jurisdictional dispute between the Brotherhood of Railroad Trainmen and the 'train porters' as to who is entitled to perform the functions of head end brakemen on passenger trains. Congress has conferred exclusive power on the National Railroad Adjustment Board to determine jurisdictional disputes."

Aside from the question of whether that statement is accurate, the last one which I read, that Congress has conferred exclusive power on the National Railroad Adjustment Board to determine jurisdictional disputes, which we believe is not supported by the law, in the case of the Order of Railroad Telegraphers vs. New Orleans, Texas and Mexico Railway Company, 156 Fed. 2nd [——]; in which Your Honor sat, the Court apparently upheld that the powers of the Adjustment Board are very limited and they have no jurisdiction in jurisdictional disputes because, they point out, first, that the Adjustment Board said it could not adjudicate jurisdictional disputes between two groups of employees. The court agreed with the Board's view as to its own powers and denied an injunction.

In the next paragraph the Appeal Court stated, "The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts; but it is given no authority to pass on disputes between the crafts. The Act leaves the settlement of inter-craft disputes to conference or to the Mediation or Emergency Boards."

Now, in the conclusion of the Court, No. 3, there is a sentence which we believe is inaccurate in the light of the statement of the 8th Circuit. The sentence, again, reads: "Congress has conferred exclusive power on the National

Railroad Adjustment Board to determine jurisdictional disputes."

Now, the bigger vice, however, in the conclusion is contained in the first sentence, "There is a jurisdictional dispute between the Brotherhood of Railroad Trainmen and the 'train porters' as to who is entitled to perform the functions of head end brakemen on passenger trains."

We take it that it is the court's view that whether the brakemen and train porters belong to the same craft, they should be classified as being of the same group is not a judicial issue, at least in the first instance for the court; that the Mediation Board should decide whether or not they belong to the same craft or whether they belong to two different crafts. However, the premise upon which this conclusion is based, that there is a jurisdictional dispute between the Brotherhood of Railroad Trainmen and the train porters, is based on the assumption that there are two different crafts, and there can be no jurisdictional dispute unless the court would assume or find that there are two separate groups.

If that fact is agreed to, if that fact is something which the Court can decide, that they are two separate groups, then it would be a waste of time for the court to send this matter to the Mediation Board to decide whether the porters are brakemen in fact or whether they belong to the same craft.

So in our exception to Conclusion No. 3 we stated it is erroneous because it is inconsistent with Conclusions 1 and 2. Under Conclusions 1 and 2 the position of the Court is that it cannot determine whether the Negro "train porters" are a separate craft but must wait the determination of that issue by the National Mediation Board. A jurisdictional dispute within the meaning of Order of Railway Conductors vs. Pitney, 326 U. S. 561, and other cases can exist only between separate crafts. That is particularly delineated in the General Committee vs. M. K. & T., 320 U. S., l. c. 334, where they refer to a jurisdictional dispute as one between two crafts.

When the court denominates this thing as a jurisdictional dispute the court then states there are two separate crafts, yet, in the first part of its order it takes the view that it cannot decide whether these are the same craft or

two separate crafts but that is a matter for an administrative agency to decide.

Then we continue with reference to our exception to Conclusion No. 3: Furthermore, the National Railroad Adjustment Board has not been empowered to determine disputes of this character, and even if so empowered could not, in this instance, as pointed out above, give fair and impartial administrative relief to Negroes.

In the first part of that sentence we are referring to the fact recognized in the Order of Railroad Telegraphers case, that the power of the Railroad Adjustment Board is very narrow and strictly limited and that even if this were a case between white organizations that it could not adjudicate the issues which are here present; but there is an additional reason why the Adjustment Board couldn't give administrative relief, because in a sense it is like a packed jury. If we knew, for instance, that on the jury were members of the Ku Klux Klan or that there was a challenge for cause because members of the jury had some objections to the type of person or the color or creed of someone which had to be tried before that jury, the probabilities are that the court, in order to render due process of law, would say, "That is not a fair jury" or as it was pointed out by the Supreme Court in cases which arose from the South where Negroes were systematically excluded from grand juries or petit juries that due process of law could not be accorded, irrespective of what the evidence may have shown otherwise; and they reversed those cases.

Here we have a situation where under a statutory scheme it has been so developed that Negroes are systematically excluded because if they are not permitted to become members of the labor organizations which select the labor representatives they have no voice in it. Furthermore, we have people who are members of this adjustment Board of the five labor members, four of whom were parties to a hostile agreement which is a facto, in this particular case and of the carrier members we have somebody who in effect is an interested party, a representative of the carrier, the party in interest in this case, and it would be just like trying a case before a jury in which we knew that a member of the firm of the plaintiff or the

defendant was a part of that jury or part of that Adjustment Board.

Now, we have some reconstructive suggestions to make in connection with the conclusions of law and findings of fact. We are aware Your Honor has given us a lot of thought and perhaps what we will say will not be easily accepted by Your Honor. In fact, you may have concluded that it is just inconsistent with your preconceived notions. However, hope springs eternal and so long as we believe that our cause is just we will keep reiterating and may perhaps in the light of the representation and rearticulation help the court to see that which it overlooked before.

Here is what we think the conclusions of law should be amended to include:

(a) The court has jurisdiction under the unusual circumstances in this matter to determine the question of whether the plaintiff and others similarly situated should be represented by the brotherhood of Railroad Trainmen.

(b) The Brotherhood of Railroad Trainmen as the statutory bargaining agent for the entire craft of brakemen violated its obligations to faithfully represent all members of that craft, irrespective of race, in seeking to take away the job functions of plaintiff and other Negro brakemen, for the benefit of white men.

That is based on the presumption that Your Honor thinks that they are brakemen.

(c) The conclusion is inescapable that the contract of March 7, 1946, would not have been entered into if not for the Brotherhood's threat of a strike. The Brotherhood threatened to strike in spite of the fact that the Emergency Board convened by the President of the United States recommended that it first refer the dispute to National Railroad Adjustment Board in accord with the decision of the United States Supreme Court in Order of Railway Conductors vs. Pitney (326 U. S. 561). This the Brotherhood refused to do and instead of choosing a lawful administrative solution, served notice of date and hour of the threatened strike. Since the contract was signed by the Carriers under duress caused by a strike threat by the Brotherhood, even if the Brotherhood owed the porters no duty to represent them and had a right to contract with respect to functions to be performed by their own mem-

bers, coercing the discharge of other employees under such circumstances voids the contract.

(d) The threatened abolition of the jobs of the "train porters" and discharge were caused by the execution of the contract of March 7, 1946, taking from them their main functions and duties and bestowing them on the white brakemen, members of the Brotherhood, and the Brotherhood must be held to have intended the natural consequences of its acts.

(e) The effect of the action of the Brotherhood of Railroad Trainmen forcing the carrier to sign the Agreement of March 7, 1946 amounted to deprivation of the jobs of Negroes solely because of their race or color.

I might say parenthetically that there is a typographical error in our motion there. We have the word "accounted" rather than amounted.

(f) The Agreement of March 7, 1946 violates the public policy of the United States—and that is the Agreement that led to the short notice to the plaintiffs that their jobs would be terminated—is an illegal interference with plaintiff's contract rights and of others similarly situated, through duress and coercion, and is therefore void.

(g) Plaintiff and other so-called "train porters" are passenger brakemen in fact and the Brotherhood of Railroad Trainmen as collective bargaining agent under the Railway Labor Act for all brakemen on the Frisco Lines was under a statutory duty to represent plaintiff and the other train porters for collective bargaining purposes without hostile discrimination.

(h) Neither the National Mediation Board nor the Railway Adjustment Board can give plaintiff and others similarly situated necessary relief. In addition, the First Division of the National Railway Adjustment Board could not give a fair hearing, even if it had administrative jurisdiction over all of the subject matter because of the affiliations of its labor members, and the presence of the representative of the defendant carrier.

(i) The plaintiff and others similarly situated would suffer irreparable injury and damage without the aid of a court of equity and have no adequate remedy at law. Furthermore, the acts complained of are prejudicial to the

public interest as well as to private rights of Negroes as citizens under Title VIII U. S. C., Sec. 41 and the Constitution of the United States.

And in that connection we direct Your Honor's attention to the dissenting opinion in the Pitney case by Judge Rutledge in which he follows through and he not only considers whether it would be prejudicial to the public interest in the sense that civil rights might be affected, but in case someone isn't given an adequate remedy and he is forced to have to wait upon something which he knows will be just as long deferred, if not denied, that that might lead to a strike, and if there is a strike it might lead to an interruption of transportation; that that is contrary to the public interest and therefore that the public interest is very, very vitally affected when a dispute arises in connection with mass transportation; for that reason if for no other that there is need for the intercession of a court of equity and not a mere reliance as in ordinary cases upon the slow and ofttimes unsatisfactory administrative relief.

Then we ask that a permanent injunction should issue restraining the defendant carriers from discharging plaintiff and others similarly situated, by virtue of the agreement entered into with the Brotherhood of Railroad Trainmen on March 7, 1946, and from hiring white brakemen to replace or displace plaintiff and others similarly situated as planned in accordance with said agreement.

(k) A permanent injunction should issue restraining the Brotherhood of Railroad Trainmen and its members from making any claims under the Agreement of March 7, 1946, or enjoying the benefits of such illegal agreement.

(l) A permanent injunction should issue to restrain the carriers from recognizing any rights or claims under the Agreement of March 7, 1946.

If the Court cannot at this juncture see its way clear to issue permanent injunctions as requested, certainly temporary injunctions pending further action by this Court or some administrative authority should be issued to protect the status quo and prevent the interference with the Negroes.

Then our last suggestion in our motion for new trial is so much of the Memorandum Opinion of the Court and

Order of August 18, 1948 as is inconsistent herewith should be corrected, and a new Order and Opinion entered in accordance with the suggested amended Findings and Conclusions.

In that connection, we believe that the Court should not be too hesitant if this Memorandum Opinion has statements of law which perhaps on second thought should be amended. In the appellate courts they have provisions for motions for rehearing and quite often an opinion is recalled and they write a complete new opinion. We believe that we counsel in the matter know more about the facts in the case after calmly studying the transcript and the record and the evidence than we did, shall we say, when the case was first brought and when we were presenting it and even while we were writing the briefs. In other words, as a result of an opportunity to become saturated with the facts and properly evaluating them and slowly studying the relationship of words and their meaning, we think that we have a much better understanding of the situation, and it is not a reflection upon any court after more mature reflection to come to a conclusion which might result in a modification of something which it has done heretofore.

I am going to defer comments on what the Carrier is requesting until I hear from Mr. Baumann.

The Court: The Court is going to suggest to you that you finish because I want to hear your side of it and it may not require anything further; so you had better finish your argument. In other words, let's be perfectly frank. This matter has been before the Court for two years. I don't know of any matter the Court has given more thought and consideration to than this case or that has been dragged out more than this case has, and I don't see any reason to sit here and listen to arguments for a long period of time that are unnecessary to a determination of the case. So the Court wants to hear you just as long as you want to argue, but the Court does not desire to listen to any argument that the Court doesn't think is necessary to the determination of these issues. So you go ahead and finish your argument.

Mr. Packman: I have no further comment to make at this time, Your Honor.

The Court: Well, as the Court suggested to counsel when this motion was filed, a request for oral argument was made, I believe, in a letter to counsel the Court stated that in [in] defending the Court, all of the matters questions which have been raised by this motion for new trial were presented to the Court at the time the case was heard; were presented in the briefs and have been considered and discussed repeatedly since that time.

I believe the case was tried in 1946, wasn't it, in August or September?

Mr. Packman: The spring—

The Court: The reason I remember that it was the last day of the World Series and the Court had tickets to the World Series and sat here and listened to the case instead of going to the game, so I remember that very well.

Of course, gentlemen, this is a case of tremendous importance to all the parties concerned with it and in considering the case the Court took that into consideration. It involves 125 or more persons who have spent, some of them, almost a lifetime in the performance of the duties which have been assigned to them. They are now threatened with being discharged, separated from service and with losing the benefit of a lifetime of labor in service.

It was the opinion of the Court at the time the case was decided, the opinion was written that the Congress of the United States had spoken on the subject and that when it had spoken this Court was bound by that authority. Since the opinion was written, the case was decided by this Court, the opinion in the case of Randolph vs. the Frisco, I believe it was—

Mr. Packman: M. K. & T.

The Court: That case was decided which sustained the view of this Court with respect to the disputes between these parties. That case was based upon the common law, it was a common law action, and I have recently had occasion to review that rather fully in the absence of Judge Reeves who decided the case. An application was presented to me to permit the filing of a supplemental complaint setting up additional facts that had occurred since the original complaint was filed and seeking an order re-

straining the discharge or the enforcement of the order, whatever it was, against the parties pending a determination by the administrative agency.

I declined to permit the filing of that petition on the theory and on the ground that the issues had been determined by the Court of Appeals in that case, and it is my recollection that the statute provides pending a determination by the administrative agency, that is, the Railroad Mediation Board, the status quo of the parties shall be maintained. I believe I am correct in that statement.

It was my view that if there was any violation of that law or any attempted violation of that law, that act, that it, was another action; it would be based upon the statute and not upon any common law or equity rights. I think the matter is probably pending before Judge Reeves. I wrote a Memorandum Opinion.

Now, as I say, these matters were before the Court, fully, and with respect to the makeup—that may not be a good word but you will know what I am talking about—of the Mediation Board, the effect of the suggestion of the motion here is that this Court quash, so to speak, the Board as it has been constituted and set up by the Congress, and to do that on the theory that it is unfair, that it is incapable of rendering justice.

I don't believe that the Court ever has a right to anticipate that an administrative agency will not render justice. If it doesn't render justice, if it violates the Constitutional rights of any person after a hearing, then it might be ground for attacking a board. But I don't believe we would have any more right to attack that board and say that it will not render justice because it is constituted in a certain way and by certain people than to say that the Interstate Commerce Commission would not render justice because it is made up of certain groups of people.

So far as the Memorandum Opinion is concerned, of course any Memorandum Opinion I think always goes into much greater detail and discusses the question much more fully than do the findings of fact. They are simply the views of the Court.

Now, it is my view, and I may be in error in this, the matter has not been considered by me for a long time, but there was some question subsequent to the adjournment of

the 87th Congress as to whether or not it had adjourned or was in recess and under the act providing for the adoption of these rules, of course, they were to become effective within a certain period of time after the adjournment of Congress

There was a special session of Congress called, and my recollection is that it was determined officially—I don't know whether it was determined judicially or not, but at least officially by the Department of Justice that the Congress did adjourn and that these rules became effective, I believe it was in March, 1947. I think that is true, at least the courts have so considered. I do not remember the date of this Memorandum Opinion.

Mr. Packman: August of 1947, August the 1st, 1947, it appears in the reporter.

The Court: August, 1947. It is also my view that under the rules where a Memorandum Opinion fully sets out the findings of fact and conclusions of law it is sufficient upon which to base an appeal without additional findings of fact and conclusions of law. I believe that is the meaning of the rule. But where findings of fact and conclusions of law are separate and apart from the Memorandum Opinion, it seems to me reasonable that it is considered that the Memorandum Opinion is a Memorandum Opinion and not to be considered as findings of fact and conclusions of law. I think the courts of appeals read the opinions to get the views from which the judge based his decision.

Now, gentlemen, we have discussed these findings of fact repeatedly. Much correspondence was exchanged between the parties and the judge in Kansas City. All of the parties made a special trip to Kansas City where we had a meeting and spent several hours going over these findings of fact. The parties left with the understanding that they would get together and try to formulate and work out the differences.

I think they did that. It is perfectly true that the counsel for plaintiff did not agree with the findings of fact. We were working out the language to a very large degree, and it is the position of the plaintiff here today, has been the position of the plaintiff from the very begin-

ning of this case; it was the real issue in the case. It was the issue that has been decided.

Now, for the Court to grant a new trial, go back over these matters, would simply be for the Court to completely change its view with respect to the law in the case. The Court has made, I think, a fair finding of fact considering the views of the Court.

The Court didn't go into this racial question except to find that Negroes were excluded from the Railway Brotherhood. It was the view of the Court that that didn't make any difference so far as a determination of the issues in this case was concerned, the law. That it was distinguished from the Kentucky case, I don't remember the name of it, where the engineer was a Negro and the Court held, of course, it was their duty to represent him. Here the porters had a separate bargaining organization of their own.

Now, the Court was not going into the question; the Court hasn't any right to go into these labor disputes. In the Randolph case the Court held, as I recall, that the Brotherhood had not committed any common-law tort. The Court also held that the distinction in that case as I recall was that the railroads did not seek to discharge the porters, they sought to cancel the contract and to enter into a new contract. Am I not correct in that? I think I am. The Court held so far as the common law rights of the party were concerned, there was no violation there. The Court held it was a labor dispute.

Now, gentlemen, if this Court sitting in the 8th Circuit in my opinion were to grant this motion for new trial and were to make the conclusions of law that the plaintiff requests it would be in the teeth of the holding of the court in Randolph v. M. K. & T. I don't see how the Court can do that in the face of the court's holding in that case. Of course, this opinion was rendered before that decision. The Court in this case granted the injunction because in the opinion of the Court the Company had violated the law in failing to give notice of the discharge.

Now, then, it is argued here that the Court ought to go farther than that to protect the rights of the parties. If the Court is correct in this case and the opinion in Randolph v. the railroad case, and the Court of Appeals has

denied certiorari in that case, then if the status quo of these parties is to be maintained, to be retained, assuming that all the law is complied with, which the Court held in this cause it wasn't, and for that reason granted a restraining order, [than] the rights must be determined under the Act of Congress setting up the Railway Labor Board which provides, as I stated a moment ago, that the status quo of the parties shall be maintained pending a determination by that body.

Now, in this case, I believe there has been no application made to the Board; is that true?

Mr. Packman: That is true, Your Honor.

The Court: Of course in the Randolph case they have gone to the Board and the Board hasn't accepted jurisdiction of it. In this case you have decided—and I am not critical, don't misunderstand me, you decided to fight it out on the line you formed.

Mr. Packman: With one exception, we did endeavor before we came to the District Court to have the Mediation Board take jurisdiction and in the deposition they verified they didn't think they had jurisdiction but maybe the issues weren't properly presented.

The Court: Now, if the condition arises in the future then I think your action to maintain the status quo of the parties may be done, it must be based upon the Railway Labor Act, not upon any common-law rights between the parties. I'm just thinking out loud about that. That leaves the view that I took in the Randolph case that I recently decided and wrote an opinion on over in Kansas City in the absence of Judge Reeves.

Gentlemen, in view of the fact that as I say all of these records have been before the Court for two years, we have considered them from every angle, I think the Court cannot reverse itself at this time, and the motion for a new trial will be overruled.

This matter ought to get on to the Court of Appeals and be finally determined, the rights of these parties.

Mr. Baumann: If Your Honor please, in connection with the order issued there is some misunderstanding between the parties as to what it means.

The Court: What?

Mr. Baumann: Some misunderstanding between the parties as to the effect of the order. We would like, if you will please indulge us for a little while, to try to iron out our differences so that Mr. Packman can save the peace and harmony and the transportation system of [American] may continue. There is an honest difference of opinion as to what it means, and we would like to ask your indulgence for a little while, if you please. It might be of assistance to all of us.

Mr. Judge: I think Your Honor's language here has clarified the differences. The only difference of opinion, as I see it, is in the actual words which were used in the order.

The Court: Did I write the order or did the lawyers write it?

Mr. Baumann: We will put it plain and simply the matter that is in dispute: Are we, the Carrier, to continue the matter in status quo as to the employment of these train porters at the present time? Are the train porters to continue as the combination head end brakemen and porters or are we by implication or indirectly is it necessary for us to put on a brakeman—

The Court: We have discussed that matter before and when counsel for all parties met with the judge over in Kansas City we discussed that question, and my recollection is that I stated at that time that the only possible theory upon which an injunction could be based was that the company had failed to comply with the law in giving the 30-days' notice with respect to the discharging of these parties, and upon no other theory could the court grant an injunction; that in the light of the Court's opinion that it was a dispute that had to be submitted to the Board, and further in the light of Randolph vs. M. K. & T. that it was such a dispute and had the Court not been of the opinion that the employer had violated the law in failing to give the notice of 30 days—as I recall the facts were that say the middle of April these parties were advised that they turn in their equipment on the 30th of April or whatever the dates were, about two weeks—and the Court

held that in view of the fact that it was a labor dispute that the Company hadn't any right to do that, and therefore the parties were entitled to the protection of the law in that respect.

Now, beyond that, gentlemen, I don't think the Court ought to be required to judicially determine what the effect of it is. The Court just said, "You didn't comply with the law and therefore you should be restrained." Now, what should happen in the future if these parties go to the Mediation Board and the Mediation Board accepts jurisdiction and the employers then seek to discharge them, if I am correct in my recollection the law provides the parties shall remain status quo, then that is another situation and that would have to be based upon the law, and I think it is admitted that the administrative agencies have no power to enforce that provision; then it would have to come back to the court with an entirely new action, under a new law, not under any relationship between the parties but simply because the railroad was violating the law with respect to the Railroad Retirement Act.

Now, gentlemen, I am not going to determine in this proceeding what is going to happen if the railroad company gives a valid notice. That isn't before the Court, in my opinion. My opinion is based solely—and I hope the Court of Appeals in considering this case or wherever it goes don't make any mistake that the Court has any other thing in mind—restraining the Company solely because the 30-day provision of the statute was not observed.

Mr. Baumann: May I ask your Honor, in your overruling of the motion for the new trial if that includes the Carrier's motion also? The Carrier also filed a motion.

The Court: I didn't know that, but it will be overruled, yes, sir.

Mr. Baumann: I just wanted—

The Court: Yes, sir, all of it will be overruled; get it on the way to the Court of Appeals. It has been two years.

Mr. Baumann: I would like to have these gentlemen join this discussion. It has some serious manifestations. Are we to understand that pending the appeal or the taking

of this matter to the Adjustment Board that we are to retain the status quo employment at the present time; did I understand you correctly or not?

The Court: If you want a legal opinion from the Court, maybe I will give it to you, but not here. I am not going to give it to you from here.

Mr. Baumann: I would like to have the attorney from the Brotherhood state their position.

Mr. Judge: As the author of the language, I think it is perfectly clear. I may be prejudiced, though. I think the thing that is giving Mr. Baumann trouble here. It says here "that the defendant St. Louis-San Francisco Railway Company, a corporation, be and it is enjoined from carrying into effect the notices of March 9, 1946 and March 14, 1946 abolishing the position of train porters for its system."

I think in connection with your conclusions of law, your memorandum opinion and what you just said from the bench the obvious intent of that is that those notices—that they be enjoined from carrying those notices into effect because they have failed to give 30 days' notice in that. If I correctly understand Your Honor that is the intent of this order.

The Court: That is the intent.

Mr. Judge: They are trying to read into this language that isn't there.

The Court: I realize the position the Company is in, of course, but gentlemen, I would be just as happy outside of the legal phases of this case, personally I would be just as happy as I could be if I could sign an order here and make it effective prohibiting the discharge of these parties or retaining them in their places. I think it would be an act of justice to do so, and if I express my own personal views it wouldn't make any difference here. But I realize the position the Company is in, but the Court—if it had not been for that particular thing in this case, then the Court would have dissolved the temporary restraining order just as was done in the Randolph case and dismissed the complaint of the complainants in this case, because I

think there is nothing in the words beyond that on which to base your restraining order.

Mr. Ray: In the Randolph case did not the Court of Appeals hold that the extraordinary relief injunction should have been withheld until the Adjustment Board attempted to settle the controversy?

The Court: I don't so understand it. Maybe you are right about it.

Mr. Ray: The case is here if you would like to look at it.

The Court: Yes, but my recollection of the case was that the order was that the jurisdiction of the case be retained pending a determination by the Board, which I don't understand, very frankly. I don't know what it means when the Court says that. I don't know. In the Randolph Case, if you read it, you will find that the Court held that the Brotherhoods had been guilty of no common-law wrong. The Court held that the railroad companies were within their rights in doing what they were doing and that if there was anything, after the hearing was over, if there were then any equitable rights which the Court might adjust the Court would have jurisdiction of it but the end of the opinion was that the restraining order be dissolved, the District Court would dissolve a temporary restraining order, and subsequent to that the plaintiffs filed a motion in the Court of Appeals asking the Court of Appeals to construe his opinion; they didn't know what it meant, and after considerable lengthy argument the Court of Appeals summarily overruled it and it came back and was presented to the Court and under the order of the Court of Appeals the restraining order was dissolved; and then, as I said, then the parties came along with an application to file a supplemental petition, complaint, alleging the fact that subsequent to the filing of the complaint that the Mediation Board—is that the right word, there are so many of those I can't keep track of them—that the Mediation Board had accepted jurisdiction of the case and that under the law it was the duty of the Company to maintain the status quo of these parties pending a determination by the Mediation Board, and that the Company, the employer was threatening to discharge them in the face of

that and sought an injunction, and that was the matter that was before the Court after the case came back. The last words of the mandate there, the opinion is that the temporary restraining order, the District Court is directed to dissolve.

Mr. Ray: In that case you went further, after dissolving the restraining order you enjoined it and that is in the teeth of the Randolph case, as I understand it.

The Court: Yes, except in the Randolph case you didn't have this question and the sole question upon which the injunction in this case is granted is the failure to observe the 30-day law.

Mr. Ray: Well, but Your Honor, there is nothing said in the Randolph case which would require 30-days' notice.

The Court: I understand that is true, but the Court took the position—

Mr. Ray: It seems to me that the Court said very expressly that recourse must be had to the Adjustment Board before any injunction—

The Court: You are in the same position that the Plaintiff is. This has all been submitted to the Court. We have discussed it time after time. I will admit it was the opinion of the Court here, it was my opinion that because the employer did not conform to the law that the rights of these parties would be irreparably [distroyed] and that they should be given that opportunity to protect it. So that is that. If you go out and serve another notice on them, then that is another case. That ends this case. I think that is the sole question.

Mr. Packman: I would like to ask one question. I hope it will tend to clarify matters. Do we understand that our right to appeal is not being denied, that despite the suggestion of the Court we may have administrative remedies, that we are not being denied our right to have this matter reviewed and that it will not be considered an affront to the Court or a negligence on our part if we first endeavor to have a review of Your Honor's conclusions, rather than prejudice our legal position by going to an administrative agency in the interim?

The Court: I think every final order that the Court makes is subject to appeal and I don't know of any judge who feels any judicial injury as a result of it. I think that is a right you have. In a matter of this kind, certainly I would welcome it, speaking personally, I would welcome a determination of it, but of course you have a right to appeal. It is a final order. What the effect of it is, the consequences, of course, that is your problem; what the future may hold. As I said, I think until the notice is given complying with the law, they are entitled to this restraining order.

Mr. Packman: If Your Honor please, I want to state publicly again that you have been very patient, quite indulgent, and none of us have any personal complaint about your attitude in this matter. We don't agree with your conclusions—

The Court: Of course not. I don't expect you to agree with me. If I were sitting in your place I wouldn't agree either.

Mr. Ray: What is a reasonable time, Your Honor? As you said a moment ago, you heard the case during the World Series. I sat here and dashed out between innings; but Your Honor's order, restraining order was for a reasonable time, that they should have a reasonable time. They have had two years.

The Court: Well, these orders—this order just became effective, and I frankly feel, gentlemen, that unless this Court loses jurisdiction—now if these parties pursue their appeal and it goes to the Court of Appeals, then I presume this Court loses jurisdiction—I am just thinking out loud about it, then it is a question for the Court of Appeals to determine; what is a reasonable time, I don't know. What is the language of the order in that respect?

Mr. Ray: ": . . . that further proceedings herein be stayed for a reasonable time in which the plaintiff may proceed before the National Railroad Labor Adjustment Board and the National Mediation Board for a determination of the claims asserted by him, the Court retaining jurisdiction hereof until further order."

The Court: Now, if an appeal is taken, then this Court loses jurisdiction. If an appeal isn't taken, then I think

an order to construe that would be in order, come back and say to this Court, "What is a reasonable time?" I don't know, I should think it would be a time in which parties could have reasonable time in which to submit it to the Board, their application.

Mr. Ray: Your Honor understands, of course, since this case was tried by Your Honor instead of going to the Adjustment Board the porters filed another case that is pending before Judge Moore.

The Court: I don't know about that. Maybe the Court is supposed to take judicial notice of all these cases but I don't know abont it.

Mr. Ray: It's a fact, not only that, they filed another one and still another one under the state court and we went to the Supreme Court of Missouri. We are in four different courts now.

The Court: Of course, this motion is overruled, gentlemen, and this is going to be the last hitch at it that this Court has unless you come back for some instructions; you have got to go to the Court of Appeals. It has been delayed as long as it can be.

Mr. Ray: As to the reasonable time, Your Honor—

The Court: If he doesn't appeal, if he doesn't perfect his appeal, that reasonable time is in there, of course it will indicate rather strongly that they are going to abandon their procedure that is open to them.

Mr. Judge: I think, Your Honor, the same situation occurred in the Telegraphers case. I think that is where this idea of reasonable time came from, was that opinion, and I believe the subsequent proceedings here were that there were motions filed and I believe finally the matter was disposed of, but I think that question of reasonable time occurred there.

The Court: I don't remember about that. I got it somewhere, of course. All right, the slate is clean for the present.

Let the record show that motion of the plaintiff and the motion of the defendant are overruled, to which action the plaintiff and the defendant except.

Notice of Appeal.

Notice is hereby given that St. Louis-San Francisco Railway Company, a corporation, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order entered in this action on August 18, 1948, in which action said St. Louis-San Francisco Railway Company filed its motion for a new trial on August 28, 1948, which motion was overruled on September 17, 1948.

M. G. ROBERTS,
S. G. RAY,
A. J. BAUMANN,
Attorneys for Appellant St. Louis-San Francisco Railway Company,
906 Olive Street,
St. Louis 1, Missouri.

Dated: October 14th, 1948.

Notice of Appeal.

Notice is hereby given that Simon L. Howard, plaintiff, appeals to the United States Court of Appeals for the Eighth Circuit from the findings of fact and conclusions of law and order filed and entered August 18, 1948 which became a final judgment on September 17, 1948 when plaintiff's (timely filed) motion for new trial, containing exceptions to findings, conclusions, judgment and order was overruled.

VICTOR PACKMAN,
1096 Arcade Bldg.,
St. Louis 1, Missouri,
Chestnut 5636,
HENRY D. ESPY,
2103 Market St.,
St. Louis, Missouri,
Chestnut 7089,
Attorneys for Plaintiff.

October 6, 1948.

Designation of Record by Plaintiff.

The Clerk of the Court will please include in record on appeal of the above-styled cause the following:

1. Plaintiff's complaint, filed March 28, 1946.

2. Plaintiff's notice to defendants, docketing for hearing application of plaintiff for temporary restraining order.

3. Copy of restraining order entered March 29, 1946.

4. Joint answer of defendants Frank A. Thompson, Trustee St. Louis-San Francisco Railway Company and St. Louis San Francisco and Texas Railway Company, filed April 22, 1946.

5. Separate answer of C. O. Carnahan, General Chairman of Brotherhood of Railroad Trainmen to plaintiff's complaint filed April 26, 1946.

6. Joint return of C. O. Carnahan, General Chairman of Brotherhood of Railroad Trainmen and Brotherhood of Railroad Trainmen, to order to show cause.

7. Separate answer of defendant Brotherhood of Railroad Trainmen to plaintiff's complaint, filed April 30, 1946.

8. Deposition of T. S. McFarland, taken October 2, 1946.

9. Deposition of Robert F. Cole, taken October 5, 1946 filed October 11, 1946.

10. Deposition of Frank W. Morey, taken October 10, 1946 filed October 14, 1946.

11. Transcript of evidence on final hearing October 14 and 15, 1946, and filed November 12, 1946.

12. Memorandum opinion of Judge R. M. Duncan, filed August 4, 1947.

13. Motion of Defendants Brotherhood of Railroad Trainmen and C. O. Carnahan to dissolve temporary restraining order and modify opinion and request for adoption of finding of facts and conclusions of law proposed by Brotherhood of Railroad Trainmen and C. O. Carnahan, filed April 8, 1948.

14. Findings of Fact and Conclusions of Law of Judge R. M. Duncan, filed August 18, 1948.

15. Notice mailed to attorneys as to filing of finding of facts and conclusions of law filed August 19, 1948.

16. Motion of defendant St. Louis-San Francisco Railway Company and St. Louis-San Francisco and Texas Railway Company to amend findings of facts and Motion for New Trial, filed August 18, 1948.

17. Motion of plaintiff for new trial, containing exceptions to findings of fact and conclusions of law and judgment, filed August 18, 1948.

18. Transcript of hearing before Court September 17, 1948 in connection with motions for new trial, filed September 28, 1948.

19. Plaintiff's notice of appeal to United States Court of Appeals from final judgment, filed October 6, 1948.

20. Record entry showing Cost bond in the sum of $250.00, filed by plaintiff October 11, 1948.

21. Notice of appeal of defendant St. Louis-San Francisco Railway Company, from final judgment and record entry showing cost bond in the sum of $250.00 filed October 14, 1948.

22. Order showing extension of time for filing record on appeal to and including January 3, 1948, filed November 12, 1948.

23. Plaintiff's designation of record.

Respectfully submitted,

VICTOR PACKMAN,
Arcade Building,
St. Louis, Missouri,
CHARLES H. HOUSTON,
615 F. Street, N. W.,
Washington, D. C.,
HENRY J. ESPY,
2103a Market Street,
St. Louis, Missouri,
Attorneys for Plaintiff.

Designation by Appellant, St. Louis-San Francisco Railway Company, of Portions of the Record, Proceedings, and Evidence to Be Contained in the Record On Appeal.

To the Clerk of Said Court:

St. Louis-San Francisco Railway Company, Appellant in the above entitled cause, hereby designates, pursuant to Rule 75 (a) (b) of the Rules of Civil Procedure for the District Court of the United States, the following portions of the record, proceedings, and evidence to be contained in the record on its appeal to the United States Court of Appeals for the Eighth Circuit from the Order, and every part thereof, entered by said District Court in said cause on August 18, 1948.

1. Complaint.

2. Temporary Restraining Order entered March 29, 1946.

3. Joint Answer of Defendants Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, a corporation, Debtor, and St. Louis, San Francisco and Texas Railway Company, a corporation.

4. Separate Answer of C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen.

5. Separate Answer of Brotherhood of Railroad Trainmen

6. Plaintiff's Exhibit Nos. 4, 6, 7, 8 and 9.

7. Defendant St. Louis-San Francisco Railway Company's Exhibits B, B-1, B-2, B-3, C, D, E, F, G, H, I, J, K and L.

8. Reporter's transcript of testimony of Simon L. Howard Sr. and C. P. King, taken at the trial of this cause on October 14-15, 1946, being pages 5 to 58, inclusive, and 211 to 259, inclusive.

9. The Memorandum Opinion of this Court dated August 1, 1947.

10. The findings of fact and conclusions of law of the District Court in this cause.

11. The Order of the District Court in this cause entered August 18, 1948, with record entry showing date of filing.

12. Defendant St. Louis-San Francisco Railway Company's Motion to amend findings of fact, conclusions of law, and order and for a new trial, with record entry showing date of filing.

13. The Order of the District Court overruling Defendant St. Louis-San Francisco Railway Company's Motion to amend findings of fact, conclusions of law and order and for a new trial, with record entry showing date of filing.

14. Appellant St. Louis-San Francisco Railway Company's Notice of Appeal.

15. The cost bond of Appellant St. Louis-San Francisco Railway Company, on appeal.

16. Order extending time for filing record on appeal and docketing the action in the United States Court of Appeals for the Eighth Circuit to and including January 3, 1949, with record entry showing date of filing.

17. The statement of points on which Appellant St. Louis-San Francisco Railway Company intends to rely on its appeal.

18. This designation.

M. G. ROBERTS,
S. G. RAY,
A. J. BAUMANN,
Attorneys for Appellant,
St. Louis-San Francisco Railway Company,
906 Olive Street,
St. Louis 1, Mo.

December 23, 1948.

[fol. 334] And thereafter the following proceedings were had in said causes in the United States Court of Appeals for the Eighth Circuit, viz.:

(Appearance of Mr. Victor Packman, Mr. Henry D. Espy and Mr. Chas. H. Houston as Counsel for Appellant in Cause No. 13899.)

United States Court of Appeals for the Eighth Circuit.

Simon L. Howard, Sr., Appellant,
No. 13899. vs.
St. Louis-San Francisco Railway Company, et al.

The Clerk will enter my appearance as Counsel for the Plaintiff-Appellant.

VICTOR PACKMAN,
St. Louis, Mo.

HENRY D. ESPY,
St. Louis, Mo.

CHAS. H. HOUSTON,
615 F. St., N. W.,
Washington, D. C.

(Endorsed): Filed in U. S. Court of Appeals, Jan. 3, 1949.

(Appearance of Mr. Joseph C. Waddy as Counsel for Appellant in Cause No. 13899.)

The Clerk will enter my appearance as Counsel for the Appellant.

JOSEPH C. WADDY,
615 F. Street, N. W.,
Washington, D. C.

[fol. 335] (Endorsed): Filed in U. S. Court of Appeals, Mar. 16, 1951.)

(Appearance of Mr. M. G. Roberts and Mr. Alvin J. Baumann as Counsel for Appellees in Cause No. 13899.)

The Clerk will enter my appearance as Counsel for the Appellees.

M. G. ROBERTS,
ALVIN J. BAUMANN,
906 Olive Street,
St. Louis, 1, Mo.

(Endorsed): Filed in U. S. Court of Appeals, Apr. 25, 1949.

(Appearance of Mr. W. Donald Dubail and Mr. Charles R. Judge as Counsel for Appellees Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, in Cause No. 13899.)

The Clerk will enter my appearance as Counsel for the Appellees, Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman.

W. DONALD DUBAIL,
CHARLES R. JUDGE,
702 Louderman Bldg.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Court of Appeals, May 4, 1949.

[fol. 336] (Appearance of Counsel for Appellant in Cause No. 13900.)

United States Court of Appeals for the Eighth Circuit.

St. Louis-San Francisco Railway Company, a corporation,
Appellant,
No. 13900. vs.
Simon L. Howard, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

M. G. ROBERTS,
ALVIN J. BAUMAN,
906 Olive Street,
St. Louis 1, Missouri.

(Endorsed): Filed in U. S. Court of Appeals, Apr. 25, 1949.

(Appearance of Mr. Charles H. Houston as Counsel for Appellees in Cause No. 13900.)

The Clerk will enter my appearance as Counsel for the Appellees.

CHARLES H. HOUSTON,
615 F. Street, Northwest,
Washington, 4, D. C.

(Endorsed): Filed in U. S. Court of Appeals, Jan. 21, 1949.

[fol. 337] (Appearance of Mr. W. Donald Dubail and Mr. Charles R. Judge as Counsel for Appellees Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, in Cause No. 13900.)

The Clerk will enter my appearance as Counsel for the Appellees, Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman.

W. DONALD DUBAIL,
CHARLES R. JUDGE,
702 Louderman Bldg.,
St. Louis 1, Mo.

(Endorsed): Filed in U. S. Court of Appeals, May 4, 1949.

(Appearance of Mr. Joseph C. Waddy as Counsel for Appellee, Simon L. Howard, Sr., in Cause No. 13900.)

The Clerk will enter my appearance as Counsel for the Appellee, Simon L. Howard, Sr.

JOSEPH C. WADDY,
615 F. Street, N. W.,
Washington, D. C.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 16, 1951.

[fol. 338] (Order of Submission in Causes Nos. 13899 and 13900.)

United States Court of Appeals for the Eighth Circuit.

September Term, 1949.

Friday, September 16, 1949.

Simon L. Howard, Sr., Appellant,
No. 13899. vs.
St. Louis-San Francisco Railway Company, et al.

Appeal from the United States District Court for the Eastern District of Missouri.

and

St. Louis-San Francisco Railway Company, Appellant,
No. 13900. vs.
Simon L. Howard, Sr., et al.

Appeal from the United States District Court for the Eastern District of Missouri.

These causes, Nos. 13,899 and 13,900, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Charles D. Houston and continued by Mr. Victor Packman for Simon L. Howard, Sr., continued by Mr. A. J. Baumann for St. Louis-San Francisco Railway Company, and by Mr. Charles B. Judge for Brotherhood of Railroad Trainmen, et al., and concluded by Mr. Victor Packman for Simon L. Howard, Sr.

Thereupon, these causes were submitted to the Court on the printed record and the briefs of counsel filed herein.

[fol. 339] (Order vacating Submission in Causes Nos. 13899 and 13900.)

Ordered by the Court that the submission of these cases to this Court on September 16, 1949, be, and is by the Court hereby, vacated and reargument of the cases is ordered at the March Session, 1951, of this Court. Filing of briefs by the respective parties is allowed either in printed or typewritten form, and if typewritten five clear, legible copies prepared on letter size paper bound in left-hand margin

and if printed twenty copies should be filed and copies served. Briefs for the appellants should be filed on or before February 3, 1951, and brief for appellees should be filed on or before March 3, 1951. However, the time of filing briefs may be agreed upon by parties if other times are more convenient but all briefs must be on file before the day of hearing.

January 5, 1951.

[fol. 340] (Order of Submission in Causes Nos. 13899 and 13900.)

Friday, March 16, 1951.

These causes, Nos. 13,899 and 13,900, having been called for hearing in their regular order, the previous submission to the Court having been vacated, reargument was commenced by Mr. Victor Packman and continued by Mr. Joseph C. Waddy for Simon L. Howard, Sr., continued by Mr. A. J. Bauman for St. Louis-San Francisco Railway Company, by Mr. Charles R. Judge for Brotherhood of Railroad Trainmen, et al., and concluded by Mr. Joseph C. Waddy and Mr. Victor Packman for Simon L. Howard, Sr.

Thereupon, these causes were submitted to the Court on the printed record and briefs of counsel filed herein.

[fol. 341] (Opinion in Causes Nos. 13,899 and 13,900.)

United States Court of Appeals

For The Eighth Circuit.

No. 13,899.

Simon L. Howard, Sr.,
Appellant,

vs.

St. Louis-San Francisco Railway Company, a Corporation, Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 13,900.

St. Louis-San Francisco Railway Company, a Corporation, Appellant,

vs.

Simon L. Howard, Sr., Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 11, 1951.]

Mr. Victor Packman and Mr. Joseph C. Waddy (Mr. Henry D. Espy and Mr. Charles H. Houston with them on the brief) for Simon L. Howard, Sr.

Mr. A. J. Baumann (Mr. E. G. Nahler and Mr. M. G. Roberts with him on the brief) for St. Louis-San Francisco

Mr. Charles R. Judge (Mr. W. Donald Dubail with him on the brief) for Brotherhood of Railroad Trainmen and C. O. Carnahan, General Chairman, etc.

Before SANBORN, JOHNSEN and RIDDICK, Circuit Judges.

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

For more than 40 years, there has existed historically on the "Frisco" Railway a class of positions and employees known as "train porter."[1] The essence of the duties of this class or craft has always been the performance of the necessary braking work on the head end of Frisco's passenger trains. The holders of the position have been required

[1]The position of train porter is an entirely separate one from that of sleeping-car porter, day-coach porter, or other special car-attendant.

to undergo the same training and to possess the same qualification as those occupying the similar general position of brakeman.

The job of train porter has been open only to negroes and, because the group has lacked the organizational strength and hold of the brakemen, the wage scale of the position (except during part of the period that the railroads were operated by the Government in and immediately following World War I) has always been less than that of the position of brakeman. There have existed the further differences between the two separately established classes or crafts of employees, that the position of train porter is confined to passenger trains alone and its braking work limited solely to the head end thereof, and that its duties have also included the tasks of keeping the coaches clean and assisting passengers in getting on and off the train.

These aisle-sweeping and passenger-assisting tasks, however, are simply minor and incidental, occupying only, as the record shows, approximately five per cent of a train porter's time. In terms of railroad fact and job reality, inherent and incapable of misunderstanding, it is plain that the position of train porter has had existence only because of the braking duties attached to it and that only because it has made unnecessary the establishing of a head-end brakeman's position on such trains has it had a 40-year survival. Economically and functionally, in free railroad operation, the establishment of the one of such positions on a passenger train necessarily will exclude the existence of the other on it.

These facts are background in the controversy that is before us. The suit involved is one brought individually and representatively, by a train porter on the Frisco, holding that position since 1917, against the Railway, the Brotherhood of Railroad Trainmen and the General Chairman

of the Brotherhood, to prevent an agreement made between the Brotherhood[2] and the Railway from being used to oust him and the other Frisco train porters individually and as a class from their jobs and from the Railway—the agreement in its practical and understood effect being alleged to have required the Railway to convert the position of train porter into the position of brakeman, with the Brotherhood refusing to permit the Railway to treat the conversion as constituting merely a change in job nomenclature and as effecting simply a consolidation of the two similar crafts and, as such, imposing upon the Brotherhood, under its statutory obligation as bargaining agent of the assimilating craft, the duty of protecting equally with its own members, those comprising the merged craft, in their inherent work right, attained employment status and resulting seniority incidents.

More specifically stated, the complaint in effect sought (1) to have declared illegal, in its attempted use to strip the train porters of their jobs by abolishing their class or craft and establishing the position of brakeman for the work, with no change in essential duty or required skill for the job, an agreement made between the Railway and the Brotherhood that "Effective April 1, 1946, the practice of train porters performing work generally recognized as Brakeman's duties will be discontinued;" (2) to prevent the members of the Brotherhood from claiming and taking over the positions of the train porter group, to the latter's exclusion, as a right created by the agreement; (3) to enjoin the Railway from ousting the train porters from their jobs and employment on the basis of the agreement; and (4) to have it declared that in any event a notice given by the Railway to the train porters on March 9, 1946, immediately following and in consequence of the making of the agreement, that the position of train porter was being

[2]The Brotherhood is collective bargaining representative for the brakeman's craft on the Railway, under the provisions of the Railway Labor Act, 45 U.S.C.A. § 152, Fourth.

abolished as of April 1, 1946, and that their employment would accordingly be terminated on that date, was of no effect, as being violative of the requirement of the Railway Labor Act, 45 U.S.C.A. § 156, that at least 30 days notice must be given of any intended change in agreements affecting working conditions.

The agreement had been exacted from the Railway, as the only means open to it to avert a strike which the Brotherhood had called of its members. The Railway's action in abolishing the position of train porter and terminating the employment of the group holding that position was admitted by it to have been taken solely because of and to enable it to carry out the exacted agreement. And in entering into the exacted agreement and undertaking to carry it out, the Railway did not recognize any right or basis in the brakemen to take over and hold the jobs involved, as against the train porters, except such as the agreement itself had created.

The controlling question here is whether the agreement and its use, on the basis of its terms and making, present merely a situation of jurisdictional dispute, such as in the first instance would require an invocation by the train porters of the National Railroad Adjustment Board's interpretative functions, for resolution of the existing rights, before any element of justiciability could properly be said to be involved. See *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795. The trial court viewed the situation as being simply of that nature.[3] 72 F. Supp. 695.

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[3]Pursuant to this view the trial court held that no justiciable controversy could be claimed to exist, until the train porters had sought a determination by the National Railroad Adjustment Board of their right to perform the head-end braking work. The court accordingly dissolved an interlocutory injunction, which had previously been issued, but stayed dismissal of the cause as to all issues for a reasonable time to afford the train porters an opportunity to exhaust the administrative remedies of the Railway Labor Act. The court did, however, declare that the notice given to the train porters of the abolition of their position and termination of their employ-

From the recitation preceding, it will be noted that the agreement does not involve, as in the ordinary situation of jurisdictional dispute, an attempted shift in some mere incident of work as between two continued classes of positions or in some mere segment of individual jobs as between two preserved crafts of employees. The agreement reached out to take over, by forced action, without regard to basis, the entire positional field of another craft, with the industrially inevitable, and so legally intended, result that that 40-year established and recognized separate craft[4] would be pushed off the Railway and cease to have existence. Only abolition of the historical position and craft of train porter could provide room for the position and craft of brakeman to move into the 40-year separately existing field. What the agreement therefore was meant to do was to compel the Railway to get rid of the position of train porter on its passenger trains and to establish the position of head-end brakeman in its stead. This implicit contractual reality the artful language used by the Brotherhood in the exacted agreement is not capable of concealing. Cf. *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 7 Cir., 171 F.2d 594, 597, 598.

And this total appropriation of previously separate-class positional field and abolition of established-craft his-

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ment as of April 1, 1946, was invalid and that no action could be taken by the Railway on the basis thereof, because such notice failed to satisfy the requirement of the Act, 45 U.S.C.A. § 156, for the giving of at least 30 days notice of any intended change in agreements affecting working conditions, and it prohibited the Railway therefore from carrying such notice into effect. The Railway has cross-appealed from the holding that the notice was thus invalid.

[4]Even the Brotherhood itself, as far back as 1928 had recognized the existence of the position of train porter and thus necessarily what that position inescapably implied, when it obtained an agreement from the Railway that, "in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed." This plainly invalid agreement was not abrogated between the Brotherhood and the Railway until after the present suit was instituted. It lends some support to the contention made by the train porters here that the present agreement was intended primarily as a further attempt on the part of the Brotherhood to keep their race out of railroad employment. Since the trial court did not reach a consideration of that factual question and the case is being disposed of here on a legal basis that would be controlling, regardless of what race might be involved, we need not further discuss this contention.

torical existence was, as has been stated, proximately being made to occur on the basis of bare exaction alone. In neither terms nor circumstances of the contracting involved did the Railway deal with the Brotherhood on the basis of the brakemen having any right to the train porters' positional field, except as a forced confiscation and turning over by the Railway of the train porters' rights as the cost to it of having a Brotherhood strike called off.

Further repeating, the only right which the Railway recognized in the brakemen to occupy the train porters' field, in both its dealings and contractual consummation, was whatever the agreement itself had created. And the Railway's action in abolishing the position of train porter and terminating the employment of those holding that position was taken solely to make possible the creation and effectuation in the brakemen of such a right of occupancy as an obligation imposed upon it by the exacted agreement. No dispute has ever existed or now exists between the Railway and the train porters as to the latter's right to continue to occupy their positional field, if the agreement in its making or its consequence, is invalid, so that the Brotherhood and its members would not be entitled to claim any exclusionary right on the basis of it. Again then, only the exacted agreement and the Brotherhood's claim of right under it are therefore proximately responsible for what is being made to happen to the train porters.

Thus, on the basis of the terms and circumstances of the parties' dealings and in the carrying out of what they mutually arrived at, the situation stands contractually as one of attempted predatory seizure and appropriation, by one railroad craft, of another's entire and 40-year established positional field, with the contemplated abolition of that craft as such, and with the assimilating craft refusing to regard its thus-acquired right of positional absorption—involving no change in essential duty or skill as to the job but in industrial reality simply a change in nomen-

clature or designation of the position itself—as imposing any obligation upon it or its statutory representative to protect the historical and craft-orphaned holders of the positional field in their previous job right, acquired employment status and resulting seniority relationship.

We think that all that such a naked contractual attempt by one craft to annex the entire positional field of another craft and so to secure the latter's abolition—as is here reflected by the circumstances of the parties' dealings and the agreement reached in their relation to the admitted nature of that positional field and the uncontrovertible fact that only its braking duties have been the basis of the craft's 40-year industrial existence and recognition[5]—could properly be regarded as effecting, within the purview and purposes of the Railway Labor Act, and in valid effect generally, would be a merging of the two previously separate but similar crafts and an accompanying assimilation of the members of the consolidated craft into the annexing craft.

If the situation should not be so regarded and treated, then the bald predatory exaction from the Railway of an obligation to deprive the train porters of their positional field and jobs, not constituting a confirmation between the parties of something previously owed or having other proper and mutually dealt-on contractual basis, would be a violation of the fundamental right of the train porters not to be made to lose their jobs and employment through artificial interference on the part of the Brotherhood or anyone else. *Truax* v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131.

There is no contention by the train porters here that a merger of the two previous similar positions and crafts, with a proper recognition of the train porters' existing

[5]A recognition also made for many years by the Brotherhood itself. See footnote 4, supra.

status and rights, could not validly be made to occur, through an agreement on the part of the Railway with the Brotherhood, such as is here involved. And in so far as the making of such a merger agreement might perhaps otherwise require previous notice by the Railway to the train porters of an intention to make, in order to give it validity under the Railway Labor Act, if such an objection were raised, the train porters do not undertake to interpose any such objection to the validity of the agreement as effecting a mere merger of the two positions and crafts. They are willing that the agreement be allowed to have the normal legal effect of which it would be capable, of having assimilated their positional field and themselves into the brakeman's craft. Also, they recognize that the Brotherhood is entitled to the status of bargaining representative for the merged crafts, by reason of the majorityship in number of its previous membership.

In this situation, it would seem only reasonable and proper that the agreement should be judicially accorded such valid legal effect as it is possible for it to have, in order that the parties involved—the Railway, the Brotherhood and the train porters—all may have the opportunity to enjoy, to as full an extent as possible, the advantages which it is capable of affording to them respectively on that basis. Thus, on the basis of the agreement, the Railway is legally privileged to reduce the kinds of positions and crafts involved in its operations, as against any otherwise possible right of objection, by consolidating the similar positions and crafts of train porter and brakeman into the single one of brakeman, leaving the members of both to occupy the unified positional field on the basis of and in relationship to their previous service status. And the Brotherhood and the brakemen similarly, by virtue of the agreement, will be able to have the position and craft of brakemen enlarged, which they apparently desire, through ab-

sorption of the similar position and craft of train porter, but with the obligation, of course, resting on the Brotherhood, in its capacity of statutory bargaining representative for the consolidated crafts, to protect the minority assimilated-craft membership equally with its own membership, in accordance with the principles of *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173.

The Brotherhood naturally would prefer to have the broader advantages, which would accrue to its members from the action which the Railway has attempted to take under the agreement, enjoyed by them as long as possible, rather than the more limited advantages, as referred to above, which the agreement is legally capable of affording them. In an effort thus to hold on to all the advantages which it has undertaken to make the Railway produce for its members from the agreement, both the invalid and the valid ones, for as long a period as possible, it seeks to becloud the plain legal situation to which the agreement of itself gives rise, as set out above, by asserting in effect that the brakemen have other rights, outside and beyond those created by the exacted agreement, to the train porters' positional field, and that this claim of rights should prompt a court of equity to ignore the results which it is undertaking to make the agreement produce, however illegal they may be as a proximate consequence in relation to the agreement alone, until the train porters have assumed the burden of carrying the situation to the Railroad Adjustment Board and have succeeded in getting the brakemen's claim of outside rights disproved. In other words, the Brotherhood asks that, for a period of 2 to 2½ years at least,[6] it be allowed to inflict upon the train porters

[6]We were advised on the argument of the case that under the present congested condition of the Railroad Adjustment Board's docket there would have to be a wait of at least 2 to 2½ years before any hearing could possibly be had before the Board. Thus the controversy involved in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 8 Cir., 161 F.2d 4, in which our opinion was rendered in 1947, and which after some further proceedings was taken before the Board, has apparently not yet been reached for hearing.

whatever consequences it is able to do, through the exacted agreement, by loosely calling the entire situation, in its unrelated aspects, a jurisdictional dispute.

In addition to making the agreement serve to disrupt the admitted 40-year positional holding of the train porters, its use to deprive the entire class of their jobs and livelihood would of course also mean that the train porters would be without opportunity for any financial leaning by a part upon the rest in any attempt to vindicate their rights. Again, with the entire class thus thrown out of work, economically weak as it recognizedly is, and with all of the members faced with the need of finding jobs reasonably promptly in order to subsist, it is obvious that but little chance would exist of preserving group solidarity or cohesion—important in any labor struggle—for the period of 2 to 2½ years or more which would be required to obtain administrative vindication. Still further, and repugnant to the basic concept of all labor in any situation, is the fact that the train porters as a labor group, through the use of the agreement to wipe out entirely their employment, position and craft from the Railway, would have been completely disarmed of labor's fundamental and most sacred weapon and the opportunity for its exercise—the power of defensive strike—and this indeed by another labor group itself.

All of this might perhaps be capable of moratory judicial ignoring, if they were in fact incidents deriving from some regular assertion of a colorable claim of rights in a jurisdictional dispute. But when the Brotherhood said to the Railway, as it did in effect, that even though the position of train porter had had existence on the Railway's passenger trains for over 40 years, with its industrially implicit and established underlying basis, the Railway now, without regard to the question of the position's right otherwise to continued existence, would have to abolish it and convert it into a head-end brakeman's position or else the mem-

bers of the Brotherhood would engage in a strike—and on this basis alone obtained the agreement here involved—it could not be said to have thereby created such possible legal rights as might colorably be claimed in the present situation to give rise to a jurisdictional dispute. The only legal effect, as we have pointed out, which such a barren exaction, from the circumstances of its making and its terms, could properly be given, would be as a consolidation of the two previously existing but virtually identical positions and crafts, and of the membership of both—and this effect it is being fully accorded.

And so the fact that the Brotherhood here claims that it has other extraneous rights against the train porters as a class, which it is not open to us to examine or determine, does not require that we allow the agreement, not made on the basis of any dealings related to or recognizive of such now-alleged rights, to be used to inflict the consequences which are being sought to be produced by the agreement alone and which when so produced are beyond the legal effect which the agreement as such, on the basis of its making, is entitled to have. Since the agreement itself affords no legal basis for the brakemen to deprive the train porters of their 40-year positional field, their established employment status and their means of livelihood, there is no right to ask to have it given that effect, even for a period of 2 to 2½ years, on the ground that the Brotherhood here claims other nonrelated, excluding rights and on their basis may have a jurisdictional dispute.

Against the consequences to the train porters of discretionarily withholding present equitable relief from such invalid effects as the agreement is being used to produce to the train porters' 40-year existing status, on the possibility that other extraneous rights capable ultimately of producing a similar result might perhaps exist, stands the consideration that the brakemen, with the invalid effects of the agreement judicially restrained, will occupy no dif-

ferent position as to enjoyment or assertion of their claimed extraneous rights than they have had at any time since the Railway Labor Act was enacted. Their extraneous rights, they say, rest on a so-called "schedule" or agreement, which antedates the passage of the Railway Labor Act, and yet, in the many years that have elapsed since the Act went into effect, they have apparently been unwilling to take any steps themselves to have an administrative determination or establishment made of such alleged rights. What they now argue is that the train porters should be made to assume the burden of disproving these alleged extraneous rights, before a court of equity should undertake to give any protection against the consequences of their legally unrelated agreement.

We would not want to prejudice in any way these alleged extraneous rights, if they exist, and indeed we shall go so far as not to allow them even to be prejudiced by the legal effect of the exacted agreement, if they are successfully established. We shall assiduously avoid hampering or preventing the proper assertion or vindication of them. In the decree which will be entered herein, appropriate steps therefore will be taken to leave open the opportunity for safeguarding to them any victory as to their extraneous rights which they may succeed in establishing and to which they would be legally entitled, under the provisions of the Railway Labor Act.

On the basis of what has been said, the trial court's refusal to consider the exacted agreement and its use in relationship to the train porters' status and rights, as constituting an attempted predatory appropriation thereof, except as a consolidation of the two positions, crafts and memberships, is reversed, and the cause is remanded with directions to enter an order of permanent injunction enjoining the Railway and the Brotherhood from using the agreement for any other purpose and from giving it any other effect than as accomplishing a consolidation of the

positions and crafts of brakeman and train porter and of the membership of the two crafts, with the Railway being required to accord proper recognition to the service status or seniority of each in relation to the others, and with the Brotherhood being required to assume the responsibility as statutory bargaining representative of the merged crafts of protecting the former train porters in their individual and class rights equally with its own members—the foregoing prohibition, however, to be subject to the following protective reservations: (1) The injunction shall not operate in any way to prevent the Brotherhood and the brakemen as previously existing from taking steps to assert and vindicate their claimed extraneous rights before the Railroad Adjustment Board or from availing themselves of any other proper means open to them under the Railway Labor Act for securing recognition of such alleged previous rights, but only in this respect shall the Brotherhood be relieved of its obligation meanwhile as statutory bargaining representative to look after the interest of the merged train porters; and (2) jurisdiction shall be reserved by the District Court in relation to the injunction issued to enable the injunction to be set aside or modified in its further operativeness, in case the alleged previous rights are so established that the existence of the injunction thereafter might serve to prevent the according to them of their proper legal effect.

Other questions have been argued which, on the disposition here made, it is unnecessary to discuss, except to say on the cross-appeal taken by the Railway from the holding of the trial court that the notice given to the train porters, in the attempted abolition of their position and termination of their employment as of April 1, 1946, was in any event invalid, as not satisfying the requirement of the Railway Labor Act, 45 U.S.C.A. § 156, for the giving of at least 30 days notice of any intended change in agreements affecting working conditions, that this holding is entitled

to be affirmed. The Railway's argued interpretation of the notice requirement of the Act is too refined and unrealistic to require comment.

We should perhaps also add the observation that the disposition which we have made on the merits has been on the basis of the particular facts and their analysis, with the legal situation resulting therefrom, and we shall therefore not engage in any unnecessary distinction of the cases which the Railway and the Brotherhood have cited.

The decree of the trial court is affirmed with respect to the invalidity of the notice given to the train porters. In all other respects it is reversed, and the cause is remanded with directions to enter an injunctive order in conformity with this opinion.

[fol. 356] (Judgment in Causes Nos. 13899 and 13900.)

United States Court of Appeals for the Eighth Circuit.

Simon L. Howard, Sr., Appellant,
No. 13,899. vs.
St. Louis-San Francisco Railway Company, a Corporation, Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan General Chairman, Brotherhood of Railroad Trainmen.

Appeal from the United States District Court for the Eastern District of Missouri.

St. Louis-San Francisco Railway Company, a Corporation, Appellant,
No. 13,900. vs.
Simon L. Howard, Sr., Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen.

Appeal from the United States District Court for the Eastern District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Decree of the said District Court in these causes be, and the same is hereby, affirmed with respect to the invalidity of the notice given to the train porters. In all other respects the said Decree is by [fol. 357] this Court hereby reversed, and this cause, on appeal and cross-appeal, is hereby remanded to the said District Court with directions to enter an injunction order in conformity with the opinion of this Court this day filed herein.

And it is further Ordered and Adjudged by this Court that Simon L. Howard, Sr., have and recover against the St. Louis-San Francisco Railway Company, a Corporation, the sum of Four Hundred Sixty-one and no/100 ($461.00) Dollars for his costs in this behalf expended and have execution therefor.

September 11, 1951.

[fol. 358] (Order Staying Issuance of Mandate in Causes Nos. 13899 and 13900.)

September Term, 1951.

Friday, September 28, 1951.

On Consideration of the motion of Appellees Brotherhood of Railroad Trainmen, an unincorporated association, and C. O. Carnahan, General Chairman Brotherhood of Railroad Trainmen, for a stay of the issuance of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 28, 1951.

[fol. 359] (Clerk's Certificate.)

United States Court of Appeals for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeals from the United States District Court for the Eastern District of Missouri were heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Court of Appeals wherein Simon L. Howard, Sr., was Appellant, and St. Louis-San Francisco Railway Company, a Corporation, Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, were Appellees, No. 13899, and St. Louis-San Francisco Railway Company, a Corporation, was Appellant, and Simon L. Howard, Sr., Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen, were Appellees, No. 13900.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at Office in the City of St. Louis, Missouri, on the 1st day of October, A. D., 1951.

(Seal)

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

[fol. 360] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 3, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

WAYLAND K. SULLIVAN,
Cleveland, Ohio,
W. DONALD DUBAIL,
CHARLES R. JUDGE,
Louderman Building,
St. Louis, Missouri,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for a writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specifications of errors to be urged	5
Reasons for granting writ	6
Conclusion	14
Appendix	15
Railway Labor Act, 45 U. S. C., sec. 151, section 3, First (i)	15
Norris-LaGuardia Act, 29 U. S. C.:	
Sec. 101, section 1	15
Sec. 101, section 13 (a)	15
Sec. 101, section 13 (c)	15

Cases Cited.

Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50 13

Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 727 11

General Committee, B. of L. E., v. Missouri, K. T. R. Co., 320 U. S. 323 ..... 7, 10, 11

Milk Drivers' Union v. Lake Valley Products, 311 U. S. 91 13

Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4 7

Moore v. Illinois Central R. Co., 312 U. S. 630 12

Order of Railway Conductors v. Pitney, 326 U. S. 561 ..... 4, 7, 9, 13

Senn v. Tile Layers Protective Union, 301 U. S. 468.. 11

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239... 4, 7, 9

State ex rel. St. L. S. F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849.... 6

Switchmen's Union v. National Mediation Board, 320 U. S. 297, 302 11

Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1..... 9

United States v. Hutcheson, 312 U. S. 219..... 13

Washington Terminal Co. v. Boswell (C. A. D. C.), 124 F. (2) 235, 247, aff'd 319 U. S. 732..... 12

Statutes Cited.

Labor Management Relations Act of 1947, Sec. 101, 61 Stat. 151, 29 U. S. C. A., Sec. 163..... 12

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101 ..... 3, 12, 13, 15, 16

Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sec. 151 ..... 3, 9, 12, 15

Textbook Cited.

56 C. J. S., p. 153..... 11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in cause No. 13899, entitled Simon L. Howard, Sr., Appellant, v. St. Louis-San Francisco Railway Company et al., Appellees, and in cause No. 13900, entitled St. Louis-San Francisco Railway Company, Appellant, v. Simon L. Howard et al., Appellees, on September 11, 1951.

OPINIONS BELOW.

The opinion of the District Court (R. 267) is reported in 72 F. Supp. 695. The opinion of the Court of Appeals (R. 339) is reported in 191 F. (2) 442.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 11, 1951 (R. 352). The jurisdiction of this Court is invoked under 28 U. S. C., section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the court has jurisdiction to resolve the jurisdictional dispute herein between the crafts of railroad brakemen and train porters over the right to the performance of certain braking job functions, and to construe and interpret a bargaining agreement relative thereto entered into by the carrier management and the recognized representatives of the craft of brakemen; or whether the jurisdiction of the administrative bodies under the Railway Labor Act over this and similar disputes is exclusive.

2. Whether the crafts of railroad brakemen and train porters, long considered by the carrier and by the crafts themselves as separate and distinct, can by judicial decree be consolidated into a single craft because of the similarity in part of the job functions performed by each; and whether, under the Railway Labor Act, the court can require the representative of the brakemen's craft to represent the craft of train porters notwithstanding the fact that train porters have long maintained their own craft representatives and negotiated their own bargaining agreements and even though prior hereto no question has ever arisen as to any right or obligation of the brakemen's representative to do so.

3. Whether the court, upholding the right of the National Railroad Adjustment Board to approve the claim of the craft of railroad brakemen to work generally recognized as brakemen's duties, may grant injunctive relief against an agreement to discontinue giving said work to train porters on the ground that the negotiations for said agreement were aided by the use of economic pressure; or whether a labor craft has any right to choose which of two legal means will be employed for the vindication of its claim.

4. Whether the injunction ordered by the Court of Appeals would violate the Norris-LaGuardia Act, this being a labor dispute; and whether it would violate the rule that plaintiffs have an adequate remedy.

STATUTES INVOLVED.

The applicable statutes are the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sec. 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101. Pertinent provisions are printed in Appendix A, p. 15.

STATEMENT.

Respondent, Simon Howard, as representative of the craft of train porters employed by the St. Louis-San Francisco Railway Co., brought this action to enjoin the carrying out of an agreement entered into March 7, 1946, between the Brotherhood of Railroad Trainmen, as representative of the craft of brakemen, and the railroad. This agreement provides:

> "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued" (R. 222).

Train porters and brakemen have been for many years recognized by the carrier as separate crafts (R. 284). Each

has its own bargaining representative. Each has its agreements with the carrier covering rates of pay, rules and working conditions (R. 231, 285). The work of train porters covered both care of passengers and head end braking on passenger trains. During the war the carrier employed chair car porters, whose sole duty was the care of passengers and thereafter head end braking constituted the major part of train porters' work (R. 19, 122).

A dispute had existed for many years over the performance of braking duties by train porters, the brakemen claiming this work belonged to them (R. 286). This dispute became one of 12 issues in a strike ballot circulated by the Brotherhood of Railroad Trainmen in December, 1945, and resulted in the agreement set forth above (R. 192). Following this agreement the railroad gave notice to individual train porters that it would, on April 1, 1946, discontinue the position of train porters (R. 49).

After a trial of the issues, the district court held that the dispute here was a jurisdictional one which it was without jurisdiction to decide, exclusive jurisdiction being vested in the administrative agencies created by the Railway Labor Act. It further held that the failure of the carrier to give 30 days notice to train porters of the discontinuance of their positions violated section 2, seventh, and section 6 of the Railway Labor Act and therefore enjoined enforcement of the notices terminating these positions (R. 288).

The Court of Appeals held that where a dispute between crafts results in one of them being eliminated from the service of the employer it is not a jurisdictional dispute such as is governed by Order of Railway Conductors v. Pitney, 326 U. S. 561, and Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (R. 342-3). The decision of the Court of Appeals was that the agreement of March 7, 1946 must be construed to effect a consolidation of the crafts of

brakemen and train porters. The parties were enjoined from giving this agreement any other effect, the railroad was ordered to recognize the seniority of the individual members of the consolidated craft in accordance with their service status, and the Brotherhood of Railroad Trainmen was ordered to act as statutory representative of the train porters (R. 350-1).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding the controversy involving the claims of two separate crafts of railroad employees to disputed job functions to be justiciable.

2. In construing an agreement between brakemen and the carrier to effect a consolidation of the crafts of brakemen and train porters, in construing said agreement with respect to seniority rights of the individual members of the two crafts, and in ordering the Brotherhood of Railroad Trainmen to act as statutory representative of the previously separate craft of train porters.

3. In imposing working conditions of its own invention on the parties through the subterfuge of construing the said agreement in a manner not intended or contemplated by the parties thereto.

4. In denying to a labor organization the right to use economic pressure by denying to it the intended result of an agreement resulting therefrom.

5. In granting an injunction in a labor dispute and where the complaining party had not exercised the administrative remedies provided by the Railway Labor Act.

6. In failing to affirm the judgment of the district court.

REASONS FOR GRANTING WRIT.

Writ of certiorari is sought here because the decision of the Court of Appeals violates federal policy as established by Congress and the decisions of this court and is in direct conflict with decisions of this court. The questions raised are of great importance because the decision determines that (a) courts have jurisdiction to decide a jurisdictional railroad labor dispute; (b) working conditions of railroad labor may be fixed and regulated by decree of court; (c) a labor agreement may be invalidated for the reason that it results from the use of economic pressure by a labor organization; and (d) an injunction may issue in a labor dispute without regard to the conditions imposed on injunctive relief by the Norris-LaGuardia Act.

I.

The dispute presented to the court in this case was one involving two crafts of railroad employees, brakemen and train porters. Each had, for many years, claimed the right to do head end braking on passenger trains, duties which are admittedly functions of the brakemen's craft (R. 3). In March, 1946, the brakemen's representative, the Brotherhood of Railroad Trainmen, and the carrier agreed that "the practice of train porters performing work generally recognized as brakemen's duties would be discontinued." Following this, the carrier notified train porters that their positions would be discontinued.

This, plainly, constituted a jurisdictional dispute.[1]

It has been consistently held by this court and the lower courts that, by reason of the Railway Labor Act, a jurisdictional dispute on the railroads does not present a jus-

1 This very dispute was held to be a jurisdictional dispute by the Supreme Court of Missouri in a companion case. State ex rel. St. L. S. F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849.

ticiable controversy. In General Committee, B. of L. E. v. Missouri, K. T. R. Co., 320 U. S. 323, it was so held with respect to a dispute involving the right of representation.

In Order of Railway Conductors v. Pitney, 326 U. S. 561, and in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, jurisdiction of the courts was again denied in jurisdictional disputes involving the conflicting claims of separate crafts to certain work. It was there held that the National Railroad Adjustment Board, created by section 3, first, of the Railway Labor Act, had exclusive jurisdiction over the interpretation of agreements, necessary to the determination of the claims of the conflicting crafts.

The decision here is in direct conflict with General Committee v. B. of L. E., supra; Order of Railway Conductors v. Pitney, supra, and Slocum v. Delaware, L. & W. R. Co., supra.

The Court of Appeals sought to distinguish this case from Pitney and Slocum because the agreement between the brakemen's representative and the carrier here resulted in the discontinuance by the carrier of the position of train porter. Thus, according to the decision, the issue of judiciability would depend, not on the existence of a jurisdictional dispute, but on such wholly extraneous matters as the relative importance of the disputed work to one of the crafts or upon the discretionary action of the employer in retaining or discontinuing the employment of one of the crafts.[2]

In Pitney and Slocum it was pointed out that courts should not interpret railway labor agreements because the

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2 In Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, a dispute between brakemen and train porters was held not justiciable where the carrier elected to take braking duties away from train porters but to retain them as employees. Here, where the carrier sought to discontinue the position of train porters, the dispute is held to be justiciable. Thus, in similar disputes involving the same crafts and the same disputed job functions, the same court arrives at different conclusions with respect to justiciability.

National Railroad Adjustment Board, an administrative agency peculiarly fitted to perform such a function, had exclusive jurisdiction to so do. There is nothing to indicate that the exclusive character of the Adjustment Board's jurisdiction is dependent on the number of men who may or may not lose jobs as a result of the dispute. Nor is a court in any better position to construe an agreement simply because a whole craft, rather than just part of a craft, loses work.

On the facts presented here the court held it had jurisdiction to decide the jurisdictional dispute before it. The decision necessarily determines, therefore, that jurisdictional disputes are justiciable, judicia discretion alone controlling whether relief shall be granted and what relief shall be granted. Utter confusion on the issue of justiciability and a flood of litigation will inevitably follow this decision.

II.

The decision here construes the agreement between the carrier and the Brotherhood of Railroad Trainmen as effecting a consolidation of the crafts of brakemen and train porters. It enjoins the parties from giving to this agreement any effect other than that decreed. It provides the manner in which seniority of the individual members of the consolidated craft shall be recognized and requires the Brotherhood of Railroad Trainmen to act as statutory bargaining representative of the previously separate craft of train porters.

The parties obviously may not bargain collectively or agree upon the subject matter of the dispute in any manner except as decreed by the court. Since, admittedly, the parties have not in fact agreed upon the consolidation of the two crafts, or on the matters of seniority or representation, it is plain that the court is imposing on the parties,

employer and employee alike, working conditions of its own invention.

In Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1, it was held that the Railway Labor Act did not provide for governmental regulation of rates of pay, rules or working conditions, but was, rather, intended to encourage agreement. In keeping with this holding is the public policy of the United States, as declared in the Norris-LaGuardia Act (Sec. 2, 47 Stat. 70; 29 U. S. C. A., section 102), recognizing the right of each worker "to negotiate the terms and conditions of his employment."

To the extent that the decision of the court may be said to have been arrived at by construing or interpreting the agreement it is in direct conflict with Order of Railway Conductors v. Pitney, 326 U. S. 561, and Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, holding that courts are without jurisdiction to interpret railway labor contracts.

To the extent that the working conditions imposed on the parties by the court were determined independently of and without regard to anything contained in the agreement, it is clearly in direct conflict with the Terminal Railroad Association case, supra.

Admittedly, train porters perform many functions constituting brakemen's duties. This fact alone, however, cannot authorize a court to consolidate the two crafts unless courts have jurisdiction generally to regulate and fix working conditions of railroad employees. As an example of the practical dangers inherent in the assumption of jurisdiction by the court is the fact that train porters may, under this decision, exercise their seniority in freight service, paying a higher rate of pay, even though they will not have had a single day's experience as a freight brakeman.

The decision respecting seniority obviously affects the rights and changes the working conditions of many persons employed by the carrier as brakemen and as train porters. The ultimate effect of this order cannot be foretold from the record for the reason that the court had before it neither evidence nor findings of fact to guide it in its decision. It is a wholly arbitrary order.

The decision requiring petitioners to act as statutory bargaining representative of train porters, despite the existence of an organization representing train porters and having agreements with the carrier, is plainly in conflict with General Committee, B. of L. E. v. M.-K.-T. R. Co., 320 U. S. 323, previously referred to, holding that courts may not decide representation questions.

The jurisdiction assumed by the court to impose working conditions of its own making on labor, to consolidate crafts, to arbitrarily tamper with seniority rights of individuals, and to decide questions of representation, is far beyond the authority of courts as that authority has heretofore been understood. If such authority exists, and if a court may substitute its judgment for agreement, the Railway Labor Act has been nullified and the naked right of labor to organize and bargain collectively can avail it nothing.

III.

The decision here presents the paradox that what is lawful as the result of an award of the National Railroad Adjustment Board is not lawful when accomplished by agreement. Thus, the decision permits the brakemen to take to the Adjustment Board their claim to the head end braking work now done by train porters based on their earlier agreements with the carrier. In the event of a favorable award by the Board the injunction against giving to the agreement of March 7, 1946 any effect except as consoli-

dating the crafts may be set aside (R. 351). In such event, and based on such an award, the taking of braking duties from train porters would be proper.

Yet this same result, accomplished by the agreement of March 7, 1946, is enjoined as an "artificial interference" with the employment rights of train porters. Thus, the decision makes it compulsory to submit disputes to the National Railroad Adjustment Board and it prohibits settlement in any other manner. That the Railway Labor Act is not to be so construed, but is rather to be considered as providing means to supplement "self help" is clear from several decisions of this court with which the decision here is in conflict. General Committee, B. of L. E., v. Missouri, K. T. R. Co., 320 U. S. 323, 332; Switchmen's Union v. National Mediation Board, 320 U. S. 297, 302; Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 727.

While the reason for this odd result is not expressly stated, the repeated reference to the agreement of March 7, 1946, as an "exacted" agreement has significance as reflecting the only reason for this decision. That reason is that the agreement resulted from economic pressure and strike threat and therefore, in the view of the court, should not be given effect.

No other reason can exist for the court's action. The object of the agreement is obviously lawful, for otherwise the same result could not follow from an award of the National Railroad Adjustment Board. And, even though the claims of brakemen to the disputed work were without foundation in prior agreements,[4] an agreement giving them that work would clearly be valid and lawful.[5] Un-

[4] The disputed work performed by train porters admittedly are brakemen's duties. In the agreement of March 7, 1946, the carrier agreed to pay time claims of certain brakemen available on August 2, 1945, thus recognizing that the claims of brakemen were based on prior agreements.

[5] "The members of a labor union may thus singly or in a body leave the services of their employers in order to * * * secure for themselves all the work of their trade." 56 C. J. S., p. 153; Senn v. Tile Layers Protective Union, 301 U. S. 468.

less the existence of a strike threat renders the resulting agreement unlawful, there can be no valid grounds for not giving effect to the agreement here in accordance with the understanding of the parties to it.

Without pursuing the point at length, we submit:

1. The right to strike and to exert economic pressure for lawful purposes has not, by law, been denied labor, but has been recognized by Acts of Congress.[6]

2. The Railway Labor Act provides procedures to prevent interruptions to commerce, but it does not make unlawful strikes or strike threats.[7]

3. Resort to the appropriate division of the Adjustment Board is not made compulsory by the Railway Labor Act nor a compulsory substitute for direct action.[8]

4. Collective bargaining agreements resulting from economic pressure, strike threats or strikes are not thereby rendered invalid.

If courts may enjoin the carrying into effect of collective bargaining agreements because they result from economic pressure, it is obvious that the rights guaranteed to labor, the right to organize and to bargain collectively, are without meaning.

IV.

The judgment to be entered in accordance with the decision of the court of appeals will provide for an injunction enjoining petitioners and the carrier from giving to their

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6 Labor Management Relations Act of 1947, Sec. 101, 61 Stat. 151, 29 U. S. C. A., Sec. 163; National Labor Relations Act, Sec. 13, 49 Stat. 457, 29 U. S. C. A., Sec. 163; Norris-LaGuardia Act, Sec. 4, 47 Stat. 70, 29 U. S. C. A., Sec. 104.

7 Washington Terminal Co. v. Boswell (C. A. D. C.), 124 F. (2) 235, 247, aff'd 319 U. S. 732.

8 Moore v. Illinois Central R. Co., 312 U. S. 630; Washington Terminal Co. v. Boswell (C. A. D. C.), 124 F. (2) 235, 243, aff'd 319 U. S. 732.

agreement any effect except as effecting a consolidation of the crafts.

The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101, provides that no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute except under circumstances specifically provided for and which do not exist here. The definitions of "labor dispute" and "a case involving or growing out of a labor dispute" provided in the statute are so all inclusive as to certainly include the dispute here.[9]

Numerous decisions dealing with the Norris-LaGuardia Act leave no doubt that the Act applies to this dispute. United States v. Hutcheson, 312 U. S. 219, and Milk Drivers' Union v. Lake Valley Products, 311 U. S. 91, involved jurisdictional disputes. New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, involved picketing by a negro organization in an effort to require retail stores to employ negroes. Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50, applied the Act to a railway labor dispute. The decision here conflicts in principle with each of these cases.

In Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., supra, it was held that the failure of the carrier to voluntarily submit to arbitration under the Railway Labor Act precluded its right to injunctive relief under the Norris-LaGuardia Act. In Order of Railway Conductors v. Pitney, 326 U. S. 561, the same results were obtained on general equitable principles without considering the Norris-LaGuardia Act. There it was held that until the conductors had applied to the National Railroad Adjustment Board for an interpretation of their agreements with the carrier with respect to the disputed jobs they

9 Norris-LaGuardia Act, Sections 13 (a) and 13 (c); Appendix A.

could not show "irreparable loss and inadequacy of the legal remedy."

Thus, whether one looks to the Norris-LaGuardia Act or to general equitable principles, the granting of injunctive relief in this case is improper and a dangerous precedent. The district court applied the Pitney decision, and stayed proceedings for a sufficient time for the train porters to either apply to the Adjustment Board for an interpretation of their agreements with the carrier, or to apply to the National Mediation Board for a determination of their claim that they were entitled to representation by the Brotherhood of Railroad Trainmen and for reclassification as brakemen. The district court properly applied the law and its judgment should have been affirmed.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYLAND K. SULLIVAN,
Cleveland, Ohio,

W. DONALD DUBAIL,

CHARLES R. JUDGE,
Louderman Building,
St. Louis, Missouri,
Counsel for Petitioners.

APPENDIX A.

Railway Labor Act, 45 U. S. C., sec. 151, section 3, First (i):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Norris-LaGuardia Act, 29 U. S. C., sec. 101, section 1:

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections. Mar. 23, 1932, c. 90, sec. 1, 47 Stat. 70."

Norris-LaGuardia Act, 29 U. S. C., sec. 101, section 13 (a):

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft,

or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

Norris-LaGuardia Act, 29 U. S. C., sec. 101, Section 13 (c):

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONERS.

WAYLAND K. SULLIVAN,
Cleveland, Ohio,
W. DONALD DUBAIL,
CHARLES R. JUDGE,
St. Louis, Missouri,
Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Specifications of error to be urged	7
Summary of argument	8
Argument	11
I.	
The dispute here involves the conflicting claims of two crafts of railroad employees to disputed jobs and job functions and is not justiciable	11
II.	
The decision of the Court of Appeals consolidating the crafts of brakemen and train porters and fixing seniority and representation imposes on the parties working conditions of the court's invention and is beyond the authority of the court	20
III.	
The decision of the Court of Appeals granting injunctive relief against the agreement of March 7, 1946, because the negotiations leading up to said agreement were aided by economic pressure, denies to employees the fundamental right to strike or threaten strike and deprives them of the economic strength, gained through organization, which is necessary to effectively bargain and reach agreements	22

Injunctive relief in labor disputes such as this is prohibited by the Norris-LaGuardia Act and by decisions of this court 26

Conclusion 29

Appendix 31

Railway Labor Act:

Sec. 1, Fifth, 45 U. S. C., Sec. 151, Fifth 31

Sec. 1 (a), 45 U. S. C., Sec. 151 (a) 31

Sec. 2, 45 U. S. C. A., Sec. 152 32

Sec. 3, First, 45 U. S. C., Sec. 153, First 34

Norris-LaGuardia Act:

Sec. 1, 29 U. S. C., Sec. 101 34

Sec. 13, 29 U. S. C., Sec. 113 35

Cases Cited.

Airline Dispatchers Association v. National Mediation Board, 189 F. (2) 685 ..... 15, 19

Brotherhood of Ry. & S. S. Clerks v. Nashville, C. & St. L. Ry. Co. (6th Cir.), 94 F. (2) 97, 99 19

Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760 19

Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50 26

General Committee, B. of L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323 ..... 9, 11, 13, 16, 26

Graham v. Brotherhood L. F. & E., 338 U. S. 232 13

Hunter v. Atchison, Topeka & Santa Fe Ry. Co. (7th Cir.), 171 F. (2) 594 19

Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, cert. den. 334 U. S. 813 ..... 14, 19

New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 561 26

Order of Railway Conductors v. National Mediation Board, 113 F. (2) 531, 533 19

Order of Railway Conductors v. Pitney, 326 U. S. 561 ..... 8, 11, 26

Order of Railway Conductors v. Swan, 329 U. S. 520 .. 15

Senn v. Tile Layers Protective Union, 301 U. S. 468, 481-2 26

Slocum v. Delaware, L. & W., 339 U. S. 239 ..... 8, 11

State ex rel. St. Louis-San Francisco Railway Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849 12

Steele v. L. & N. R. Co., 323 U. S. 192 ..... 11, 12, 13, 27

Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 297 16

Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1, 6 22

Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 458, 570 ..... 21, 25

Tunstall v. Brotherhood L. F. & E., 323 U. S. 210 13

United States v. Hutcheson, 312 U. S. 219 26

United Transport Service Employees v. National Mediation Board, 179 F. (2) 446 16

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 ..... 21, 25

Washington Terminal Co. v. Boswell, 124 F. (2) 235, 247, aff'd 319 U. S. 732 24

Statutes Cited.

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101. 3

Sec. 1, 29 U. S. C., Sec. 101 34

Sec. 13, 29 U. S. C., Sec. 113 35

Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sec. 151. 3
Sec. 1, Fifth, 45 U. S. C., Sec. 151, Fifth.....19, 24, 31
Sec. 1 (a), 45 U. S. C., Sec. 151 (a)..... 31
Sec. 2, 45 U. S. C., Sec. 152.....14, 32
Sec. 3, First, 45 U. S. C., Sec. 153, First.....14, 15, 34

Textbook Cited.

56 C. J. S., p. 153..... 26

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court (R. 267) is reported at 72 F. Supp. 695. The opinion of the Court of Appeals (R. 339) is reported at 191 F. (2) 442.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 11, 1951 (R. 352). Petition for writ of certiorari was filed December 3, 1951 and was granted March 3, 1952. The jurisdiction of this court rests on 28 U. S. C., section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the court has jurisdiction to resolve the jurisdictional dispute herein between the crafts of railroad brakemen and train porters over the right to the performance of certain braking job functions, and to construe and interpret a bargaining agreement relative thereto entered into by the carrier management and the recognized representatives of the craft of brakemen; or whether the jurisdiction of the administrative bodies under the Railway Labor Act over this and similar disputes is exclusive.

2. Whether the crafts of railroad brakemen and train porters, long considered by the carrier and by the crafts themselves as separate and distinct, can by judicial decree be consolidated into a single craft because of the similarity in part of the job functions performed by each; and whether, under the Railway Labor Act, the court can require the representative of the brakemen's craft to represent the craft of train porters notwithstanding the fact that train porters have long maintained their own craft representatives and negotiated their own bargaining agreements and even though prior hereto no question has ever arisen as to any right or obligation of the brakemen's representative to do so.

3. Whether the court may grant injunctive relief against an agreement wherein the carrier agreed with brakemen to discontinue giving to train porters work recognized as brakemen's duties on the ground that the negotiations for said agreement were aided by economic pressure.

4. Whether the injunction ordered by the Court of Appeals would violate the Norris-LaGuardia Act, this being a labor dispute; and whether it would violate the rule that plaintiffs have an adequate remedy.

STATUTES INVOLVED.

The applicable statutes are the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., sec. 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., sec. 101. Pertinent provisions are printed in Appendix, p. 31.

STATEMENT.

This action involves a collective bargaining agreement entered into on March 7, 1946, between the respondent carrier and the petitioner, Brotherhood of Railroad Trainmen. The agreement provides:

> "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued" (R. 222).

The Brotherhood of Railroad Trainmen is the collective bargaining representative of the craft of brakemen employed by the respondent carrier and has had agreements with the carrier on behalf of the craft for many years. The craft of train porters, all of whom are negroes, are employed on many of the passenger trains of the carrier and perform head end braking duties on those trains as well as looking after the needs of passengers and keeping cars clean enroute.

The performance of brakemen's duties by train porters had been a matter of dispute between the brakemen and the carrier for many years (R. 286). This dispute became one of twelve issues on a strike ballot circulated in December, 1945, and the agreement of March 7, 1946, followed (R. 192).

Train porters are, and always have been, recognized by the carrier as a separate craft (R. 233, 272, 277). Continuously, since 1921, they have had their own collective bargaining representatives and contracts covering wages

and working conditions (R. 277). They have never had seniority as brakemen (R. 79, 91). Excepting a relatively short period during government operation of the railroads in World War I, train porters have always received a lower rate of pay than brakemen (R. 271-2).

Following the agreement of March 7, 1946, the carrier determined, for economic reasons, to discontinue the employment of train porters rather than to take away their braking duties and to retain them in its employ.[1] It was conceded by the carrier that the discharge of train porters had not been demanded by the Brotherhood of Railroad Trainmen (R. 129, 133). Notices were given to the train porters by the carrier discontinuing the position of train porter and terminating their employment effective April 1, 1946 (R. 45).

Respondent, Simon L. Howard, Sr., for himself and on behalf of the craft of train porters, filed this action to enjoin the discharge of train porters and the discontinuance of their positions and to set aside and enjoin the carrying into effect of the agreement of March 7, 1946. As grounds for this relief respondent alleged in substance that, by reason of their performance of braking duties, train porters were in fact members of the craft of brakemen and entitled to nondiscriminatory representation by the Brotherhood of Railroad Trainmen; that their separate craft existence and designation as "train porter" and the failure of the Brotherhood of Railroad Trainmen to give them representation was the result of racial prejudice (R. 1-7).

The evidence indicates that a substantial change in train porters' duties and in employment requirements and

1 It was the intent of the carrier to employ chair car porters instead of train porters to care for passengers and cars en route (R. 224). Chair car porters, a craft recently employed by the carrier to relieve train porters of "portering" duties, received less pay than train porters (R. 19, 122).

responsibilities has occurred over the years. The record (R. 259-60) discloses that in 1918 the principal duty of train porters was the care of passengers and cars en route with braking duties being of minor importance. Substantial differences between brakemen and train porters existed with respect to educational qualifications, examination on train rules and responsibility for execution of train orders. In the years following, the introduction of air conditioned equipment and the subsequent employment of chair car porters, who took over much of the "portering" duties of train porters, altered conditions and respondent Howard testified that 95% of his working time at the time of trial was devoted to braking work (R. 122, 134). Differences in educational requirements, examinations and responsibility have largely, if not entirely, disappeared (R. 264).

The director general of railroads, in December, 1918, issued "Supplement 12 to General Order 27," which required all persons performing brakemen's duties to receive brakemen's pay. Thereafter, and for the duration of government control, train porters were paid the brakemen's rate of pay (R. 271-2). After the return of the railroads to private operation respondent carrier reduced the pay of train porters (R. 272). At the same time, train porters, previously unorganized, selected a general chairman and entered into a contract with the carrier and they have ever since had representation and agreements covering wages and working conditions (R. 277). There is nothing to indicate that they ever desired representation by the Brotherhood of Railroad Trainmen and no request for such representation was ever made until shortly before the institution of this action (R. 79-80, 276, 278).

The district court held that the dispute here was a jurisdictional dispute involving two separate crafts and not justiciable. The judgment ordered the proceedings stayed

for a reasonable time in which the train porters might apply to the National Mediation Board for a determination of their claim for reclassification and representation by the Brotherhood of Railroad Trainmen or to the National Railroad Adjustment Board for a determination of their contractual rights to the disputed job functions (R. 288-290). From this judgment respondent Howard appealed. The district court also held that the notice given by the carrier to train porters terminating their employment violated section 2 seventh and section 6 of the Railway Labor Act by failing to give 30 days notice there required and from this holding the respondent carrier appealed.

The court of appeals held that where a jurisdictional dispute resulted in the loss of employment by one of the crafts involved the dispute was justiciable (R. 342-3). It decided that the "exaction" of the agreement of March 7, 1946, by strike threat was illegal and enjoined the parties from giving that agreement its intended effect (R. 345, 350-1). It construed the agreement to effect a consolidation of the crafts of brakemen and train porters, ordered the carrier to recognize the seniority of the individual members of the consolidated craft in accordance with their service status, and ordered petitioner Brotherhood of Railroad Trainmen to act as statutory representative of train porters (R. 350-1).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding the controversy involving the claims of two separate crafts of railroad employees to disputed job functions to be justiciable and in construing an agreement between brakemen and the carrier to effect a consolidation of the two separate crafts.

2. In imposing working conditions of its own invention on the parties through the subterfuge of construing the agreement between petitioners and the carrier in a manner not intended or contemplated by the parties thereto.

3. In denying to a labor organization the right to use economic pressure in collective bargaining by denying to it the intended result of an agreement negotiated with the aid of a strike threat.

4. In granting an injunction in a labor dispute and where the complaining party had not exercised the administrative remedies provided by the Railway Labor Act.

SUMMARY OF ARGUMENT.

This controversy concerns an agreement of March 7, 1946, wherein respondent carrier promised brakemen that "the practice of train porters performing work generally recognized as brakemen's duties will be discontinued."

The dispute here thus involves the demands of one craft (brakemen) for its own job functions conflicting with the demands of another craft (train porters) to the same job functions. It involves a labor dispute of a jurisdictional nature and is not justiciable. The decision in Slocum v. Delaware, L. & W., 339 U. S. 239, and Order of Railway Conductors v. Pitney, 326 U. S. 561, hold that such jurisdictional disputes involving the claims of two crafts to disputed work are not justiciable.

Because the non justiciability of jurisdictional disputes is so firmly established in the law, respondent seeks to make this a case of race discrimination. He asserts that the performance by train porters of the brakemen's duties in question entitles train porters to representation by petitioners, the representatives of brakemen, and that the failure to afford such representation is the result of racial prejudice.

The duty of representation exists with respect to all members of the craft represented, regardless of race, but does not extend to a competing craft, organized and recognized as a separate craft. The record here establishes and the district court and court of appeals found that train porters and brakemen are separate crafts, organized and recognized as such and having their own separate agreements with the carrier. The craft status of train porters was the responsibility and act of the carrier and accepted by train porters for purposes of representation. It is not based on racial prejudice but on historical differences be-

tween the two crafts and on the acquiescence of train porters.

Train porters are not entitled by law to representation by petitioners because they are not members of the craft of brakemen. Whether they should be reclassified as brakemen presents a representation question that is not justiciable under General Committee, B. of L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323.

The administrative agencies under the Railway Labor Act have jurisdiction over controversies such as is presented here; the National Railroad Adjustment Board over any contractual claims by train porters against the carrier to the disputed work, the National Mediation Board over representation questions. In determining representation questions the Mediation Board can, and in the past has, fixed craft lines and reclassified employees.

Brakemen and the carrier have not in fact agreed to a consolidation of the crafts of brakemen and train porters. The court of appeals, in giving "effect" to their agreement as effecting such a consolidation, and fixing seniority and representation, is imposing on the parties working conditions of its own invention. This is clearly beyond the court's authority.

The court of appeals enjoined the parties from giving the agreement of March 7, 1946 the effect intended by the parties because the threat of strike entered into the negotiations leading up to the agreement. It held the "exaction" of the agreement made its intended effect illegal. The Railway Labor Act does not prohibit the use of economic pressure in collective bargaining or make strikes or strike threats illegal. It does not thus deprive labor of its economic strength but, in fact, protects the right to organize and negotiate and provides voluntary processes to promote agreement. The agreement here was for the

legitimate purpose of securing work admittedly belonging to the brakemen's craft and is lawful and valid.

Injunctive relief is prohibited in labor disputes by the Norris-LaGuardia Act and by decisions of this court excepting only to protect rights created by the Railway Labor Act for which no administrative remedy is provided. The claims of train porters do not involve such rights. The Act does not impose on petitioners any duty to represent them as a separate craft. Whether they are entitled to representation by way of reclassification is not a question of right but may be determined on the basis of all the facts by the Mediation Board. Claims which they as a separate craft may assert to the work do not arise out of the Act but out of their agreements with the carrier and are determinable by the Adjustment Board. As to such contractual claims, the agreement between brakemen and the carrier could not defeat contractual obligations owed by the carriers to train porters.

This controversy concerns a jurisdictional dispute, not a case of race discrimination. The settled law respecting jurisdictional disputes should be applied here, and the decision of the Court of Appeals reversed.

ARGUMENT.

I.

The dispute here involves the conflicting claims of two crafts of railroad employees to disputed jobs and job functions and is not justiciable.

The dispute here, beginning as the demand of one craft for its own job functions and developing into conflicting claims of another craft to the same job functions, is not justiciable.

The craft of brakemen on the Frisco Railway claims it is entitled to perform certain of the job functions performed by the craft of train porters. The porters deny that claim; and insist that they themselves are entitled to said job functions. The job functions involved here are the subject of the agreement entered into March 7, 1946 between the brakemen and the carrier whereby the latter contracted to discontinue giving to train porters work generally recognized as brakemen's duties.

This dispute is clearly a labor dispute of the jurisdictional variety. That this is so would ordinarily be admitted by all. Moreover, that the courts are without power to construe railroad labor agreements is likewise ordinarily now admitted by all. The case of Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, involving a jurisdictional dispute between the crafts of telegraphers and clerks, so holds. See also Order of Railway Conductors v. Pitney, 326 U. S. 561, and General Committee, B. L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323. Such disputes are simply not justiciable. Even the case of Steele v. L. & N. R. Co., 323 U. S. 192, upon which respondent relies, recognizes this. The opinion of the court in the Steele case says, l. c. 204:

"The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the act * * *."

Because the non-justiciability of jurisdictional disputes is now so firmly established in the law, respondent seeks to convert this dispute into one of racial discrimination. Train porters seek to take special advantage because of their color by simply charging this to be a racial issue. Thus, train porters are seeking discrimination in their favor on account of color.

There is no reason at all why a jurisdictional dispute cannot exist between two crafts of different color. When such a dispute does exist, as here, it should be recognized as such. It should not be obscured or doubted simply because other negro employees of the carrier may have been in some other way or at some other time involved in racial conflict. The record in this case may show instances of such conflict, but we submit there is nothing in the record to indicate that this controversy was in any way aided or abetted by such instances.

That the crafts of brakemen and porters are separate and distinct was found both by the district court and the court of appeals. The crafts themselves consider themselves separate and distinct with their own craft representatives and their own schedule agreements. The carrier has at all times considered the two crafts as separate and distinct (R. 233, 272, 277). The Supreme Court of Missouri, in a companion case, found that they constituted separate crafts. State ex rel. St. Louis-San Francisco Railway Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849. The record so overwhelmingly supports this view as to require that the dispute be considered as one between two crafts.

Whether train porters should be reclassified as brakemen for purposes of representation is not a justiciable

question. That involves a representation question which this court held is not justiciable. General Committee, B. L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323.

This is not then such a dispute as was present in Steele v. L. & N. R. Co., 323 U. S. 192; Tunstall v. Brotherhood L. F. & E., 323 U. S. 210, and Graham v. Brotherhood L. F. & E., 338 U. S. 232, where a craft representative had discriminated against recognized members of the craft on the basis of race. In those cases the men involved had seniority as firemen and worked under the firemen's agreements with the carrier with rates of pay and working conditions as provided in those agreements. Here train porters are not employed or recognized and do not work as members of the craft of brakemen, and are, therefore, not, as a matter of law, entitled to representation by the brakemen's representative.

The Court of Appeals, while considering the train porters to constitute a separate craft, and the dispute here to be one between two crafts, nevertheless held that where a jurisdictional dispute between two crafts resulted in the displacement of one of the crafts in its entirety, the dispute was justiciable. It thereupon decided that the agreement of March 7, 1946, between the brakemen and the carrier should be construed to effect a consolidation of the two crafts. There are no decisions whatever to support the court's conclusion.

We consider it to be settled law at this time that railway labor disputes requiring the interpretation of agreements or the determination of representation questions are not justiciable. The decision of the court of appeals, however, necessarily holds that jurisdictional disputes are justiciable and that courts may interpret railway labor agreements. The effect of this decision is to limit the Pitney and Slocum cases to the exact facts there present and to otherwise permit judicial determination of such con-

troversies wherever, in the court's discretion, that seems desirable. It makes the decision in Pitney and Slocum exceptions to a rule of justiciability rather than the rule of non justiciability as was clearly intended.

The reasoning of Pitney and Slocum and the earlier General Committee case does not permit any such construction. The jurisdiction of the National Railroad Adjustment Board to interpret agreements and of the National Mediation Board to determine representation disputes, as fixed by section 3, First (i) and section 2, Ninth, respectively, of the Railway Labor Act, is not dependent on such extraneous matters as the court of appeals would make decisive. Certainly, the question of jurisdiction should not hang on the number of men involved or on the discretionary action of the carrier in discharging or retaining in its employ the persons involved.[2] **Neither is a court in any better position to interpret an agreement simply because a whole craft, rather than just part of a craft, loses work.**

The import of the decisions referred to is that the administrative agencies created by the Railway Labor Act have exclusive jurisdiction over the dispute here, the National Railroad Adjustment Board over any claim the train porters may assert to the disputed work based on their agreements with the carrier, the Mediation Board over the question of representation based on reclassification as brakemen.

There can be no quarrel over the jurisdiction of the Adjustment Board to determine the claim of train porters, bearing in mind that that claim is not, as the court of ap-

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2 The confusion that would necessarily result from the Court of Appeals' decision appears by reference to Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, Cert. Den. 334 U. S. 818, wherein a similar dispute involving the same crafts over the same job functions as here resulted in the same court holding the controversy to be non-justiciable where the carrier elected to take braking duties away from train porters but to retain them in its employ.

peals thought, to disprove the claims of brakemen to the work (R. 347, 350), but is against the carrier, and for the purpose of interpreting their own agreements with the carrier. Railway Labor Act, section 3, First (i).

The argument of the porters that the National Mediation Board will not decide the question of representation by way of reclassification because of the non-existence of a representation dispute involving an election is of no consequence; nor is the question of the non-acceptance of jurisdiction by the Board material. The Board is obviously not the final arbiter of its own jurisdiction. Airline Dispatchers Association v. National Mediation Board, 189 F. (2) 685; Cf. Order of Railway Conductors v. Swan, 329 U. S. 520. Neither would the absence of such jurisdiction necessarily make such controversy justiciable as we will hereinafter point out.

Section 2, Ninth, of the Railway Labor Act gives to the Mediation Board power to act "if any dispute shall arise among a carrier's employees as to who are the representatives of such employees * * *." While the representation question as asserted by the train porters is not the conventional type of such problem, that is, one in which two or more organizations are asserting the right to represent certain employees, the statute plainly does not limit the Board's authority to such conventional problems. Rather the Board's authority comes into existence "if any dispute shall arise * * * as to who are the representatives of such employees."

The train porters are entitled to representation by the Brotherhood of Railroad Trainmen only if they are now members of the craft of brakemen, or, as to future representation, if they are reclassified as brakemen and brought into the craft. Clearly, they are not now members of the craft working under the brakemen's agreements with the carrier. The Mediation Board, in determining representa-

tion disputes, may take a secret ballot or "utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives." When occasion required the Board has designated the members of the craft involved in the dispute and has reclassified employees, taking members of one craft and placing them in other crafts for the purpose of representation. Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 297; United Transport Service Employees v. National Mediation Board, 179 F. (2) 446.

The representation question raised here by train porters is dependent on their right to reclassification as brakemen. A decision on reclassification is certainly, therefore, an "appropriate method of ascertaining" their representative and within the scope of the Board's authority.

We think it is evident that a claim for representation by way of reclassification does not present a claim of absolute right, but one to be decided on the basis of all the facts. Intricate questions will necessarily appear and will vary from case to case. The effect upon possible claims of a similar nature, on other properties, or by other crafts, and the effect upon seniority rights and rights of other organizations must be considered. Whether or not the determination of the dispute here is within the broad grant of powers over such controversies given the Mediation Board, it is certain, in any event, that the determination of such problems was not left to the courts and General Committee, B. of L. E. v. Missouri-Kansas-Texas R. Co., 320 U. S. 323, so decided, holding representation disputes not justiciable.

In that decision, it was stated, l. c. 336:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * * If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view

of § 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied."

It is interesting that in the General Committee case this court anticipated the argument of the train porters that the Mediation Board would act in only those disputes that required an election to determine representatives. In a footnote on page 336 it was observed that the Board at that time apparently held to that view. It is evident that this court, in that decision, had in mind the exact question which the train porters have raised in this case. The conclusion is inescapable that the existence or absence of jurisdiction in the Mediation Board in the controversy presented here does not control justiciability.

The porters contend that they are entitled to be represented by the Brotherhood of Railroad Trainmen. This is a representation question under the Railway Labor Act and nothing more and as such is non justiciable. It is not a question of color.

There remains the argument heretofore stressed by train porters that their existence as a separate craft and

the failure of the Brotherhood of Railroad Trainmen to represent them is the result of racial prejudice.

While we think the facts, as we shall set them forth, clearly show that the craft status of train porters is not the result of racial prejudice, it should be noted that **this craft status was the responsibility of and resulted from the act of the carrier** (R. 180, 227, 233, 277), **and petitioners are not charged with any responsibility therefor. The issue, so far as petitioners are concerned, is one of duty to represent.** This duty is imposed with respect to all craft members, regardless of race, but **racial conflict alone could not create such a duty where it otherwise does not exist.**

To sustain their contention as to craft status, train porters emphasize the similarities of the two crafts **under today's conditions.** Since the craft status of train porters is by no means of recent origin, however, the question whether racial discrimination is responsible for that status cannot be answered by looking at today's conditions and today's demands. The facts are that today's similarities are the result of changed conditions. Historically, the care of passengers and cars en route was the principal duty of train porters. Vastly different conditions existed with respect to employment qualification, knowledge of train rules and responsibility for train orders (R. 259-60). The introduction of air-conditioned equipment served to lighten their cleaning duties (R. 134) and the recent employment of chair car porters on some trains practically eliminated the "portering" duties of train porters on those trains, since those duties were taken over by the newly employed craft (R. 19, 122).[3]

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[3] This encroachment on train porters' duties by chair car porters has apparently not been protested by them. Undoubtedly, it was the existence of the new craft that caused the carrier to decide to discharge train porters in March, 1946, rather than to retain them in its employ. Chair car porters received less pay and the carrier intended to use them instead of train porters (R. 224).

Not only was this craft status based on real and substantial differences, but it was also based on the acceptance by train porters of this status (R. 277, 278). The fact that, under the present exigencies, they are demanding recognition as brakemen with representation by petitioners does not establish that this was always their desire.[4] Certainly, they never indicated any desire for representation by the Brotherhood of Railroad Trainmen and made no request for such representation prior to the present controversy (R. 79, 276, 278). So far as the record discloses, and we think it is the fact, train porters were satisfied with their separate craft status.

On several occasions courts have commented that it was the intent of the Railway Labor Act of 1926 to recognize crafts as they had previously been organized and not to compel the creation of new craft lines. Order of Railway Conductors v. National Mediation Board, 113 F. (2) 531, 533; Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760; Brotherhood of Ry. & S. S. Clerks v. Nashville, C. & St. L. Ry. Co. (6th Cir.), 94 F. (2) 97, 99. See, also, Railway Labor Act, Sec. 1, Fifth. The effect of the Act was to "freeze" craft lines, subject to change by voluntary action or act of the Mediation Board. The 1934 amendment to the Act required carriers to deal with the representative selected by a craft and with none other. Virginian Railway Co. v. System Federation, 300 U. S. 515. Thus, **the Railway Labor Act does not permit a carrier to change craft lines as they had previously been fixed and accepted for representation purposes.** Prior to passage of the Act, and continuously since, train porters have selected representatives of their own choosing without any indication that this was not in accord with their desires, and the carrier was prohibited

[4] Train porters employed on other carriers do not apparently share the present views of respondent, but are seeking to preserve their employment as a separate craft. Cf. Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4; Hunter v. Atchison, Topeka & Santa Fe Ry. Co. (7th Cir.), 171 F. (2) 594.

by law from dealing with anyone else. To now say, in the face of the facts here, that their craft status is evidence of racial discrimination, requires a denial of their craft history.

Much has heretofore been made of an agreement in effect from 1928 until its cancellation in April, 1949, between four labor organizations, including the Brotherhood of Railroad Trainmen, and the carrier, wherein the carrier agreed not to thereafter employ negroes in train, engine and yard service. Train porters were specifically excepted from the terms of this agreement. It is evident that this agreement neither creates nor evidences any duty of representation by petitioners to train porters. In fact, it emphasizes their separate craft existence and in no way indicates any dissatisfaction on their part with that status.

It should be noted that there are negroes employed by the carrier as brakemen. These men are distinguishable from train porters, since they were employed by the carrier as brakemen, they work under the brakemen's agreements and have wages, seniority and working conditions the same as white brakemen (R. 39). Negro brakemen and white brakemen are alike represented by petitioners (R. 238). Train porters are not so represented, not by reason of race, but because they are a separate craft, organized, recognized and having their own representation as such.

II.

The decision of the court of appeals consolidating the crafts of brakemen and train porters and fixing seniority and representation imposes on the parties working conditions of the court's invention and is beyond the authority of the court.

The solution of the court of appeals to this controversy was to construe the agreement of March 7, 1946, to effect

a consolidation of the crafts of brakemen and train porters. The parties were enjoined from giving the agreement any other effect, the carrier ordered to recognize seniority of the individual members of the two crafts in accordance with their service status and petitioner Brotherhood ordered to act as statutory representative of the previously separate craft of train porters.

While the court appears to base its action on a construction or interpretation of the agreement, it is admitted that the parties did not in fact agree to a consolidation of the two crafts or the determination of seniority and representation questions. Neither were the parties to the agreement in any doubt or dispute as to the construction or meaning of the agreement so as to require a construction thereof. It is plain that the result arrived at by the court constitutes, in fact, an entirely new agreement written by the court, imposing on the parties working conditions designed by the court to satisfy it with respect to the situation before it.

This action of the court goes far beyond the issue of justiciability. It raises the further issue of the authority of a court to impose on the parties to a labor dispute working conditions of its own invention. We doubt that anyone will take issue with our assertion that such authority does not exist.

The protection of the right of labor to organize, select representatives, bargain and enter into agreements covering wages and working conditions was one of the purposes of the Railway Labor Act. Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 570; Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515. One of the safeguards provided by this Act was the imposition upon the carrier of a positive duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."

Railway Labor Act, Sec. 2, First. This Court declared in Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1, 6:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them."

Obviously, the right to organize and make agreements with one's employer is of little use if agreements, when so made, may be set aside at the will of a court and replaced with conditions of employment which that court deems more suitable.

That the changes in working conditions imposed by the court could be accomplished by agreement of the parties is not here denied. But they were not so agreed to by the parties and the decision of the Court of Appeals giving such "effect" to the agreement of March 7, 1946, cannot alter that fact. These changes, affecting the working conditions of all the members of both crafts, were of the court's own invention and clearly beyond its authority.

III.

The decision of the Court of Appeals granting injunctive relief against the agreement of March 7, 1946, because the negotiations leading up to said agreement were aided by economic pressure, denies to employees the fundamental right to strike or threaten strike and deprives them of the economic strength, gained through organization, which is necessary to effectively bargain and reach agreements.

The Court of Appeals held that the only legal effect that could be given the agreement of March 7, 1946, was to effect a consolidation of the crafts of brakemen and train porters. If given the effect intended by the parties, this agreement, in the view of the court, was illegal.

The reason why the intended effect of this agreement is held illegal is that the agreement resulted from the threat of strike by the brakemen. Some fourteen times in the opinion is the agreement referred to as an "exacted agreement" or an "exaction." It is asserted that the agreement resulted, not from a claim of right in a jurisdictional dispute, but solely from the strike threat—"and on this basis alone obtained the agreement here involved" (R. 349). A distinction is inferred between a "defensive strike," which the court thought was a "fundamental and most sacred weapon" the use of which trainporters were being deprived (R. 348), and a strike for economic gain, such as the brakemen threatened and which the court obviously condemns.

The only reason stated by the court for its finding of illegality is that petitioners' "predatory exaction" of the agreement constituted "artificial interference" with the employment rights of train porters (R. 345). It was not the agreement itself or its results that constitute this "artificial interference." It was the "predatory exaction" of the agreement that brought about this result.

By "predatory exaction" the court referred to the strike threat that accompanied the brakemen's demands. It argued that the claims of the brakemen were without contractual basis and hence without any support excepting the strike threat (R. 345, 348).[5]

It should be noted that the carrier has at no time sought relief with respect to this agreement. In the Court of Appeals it argued for affirmance of the judgment of the District Court except only the holding invalidating the notices

5 The assumption by the court that brakemen were without contractual right to the disputed work cannot be reconciled with the facts. Train porters have admitted that this work belongs to the craft of brakemen. The agreement of March 7, 1946, refers to the work as "brakemen's duties." Brakemen had in fact performed this work on trains 1 and 2 of the carrier for many years (R. 122-3). To find that this work is not covered by the previous agreements of the brakemen with the carrier, when the court did not even have those agreements before it, is an obvious impossibility.

of discharge for failure to give 30 days notice (R. 342, Note 3).

Had the agreement of March 7, 1946, been negotiated without the use of economic pressure it is plain that nothing in the opinion of the court would hold the agreement illegal. The decision reserves jurisdiction in the District Court to set aside or modify its injunction, and thus to let the agreement and its results stand, if the claims of the brakemen are sustained by the Adjustment Board. Thus, resort to the Adjustment Board is made a compulsory substitute for the use of economic pressure and agreement and clearly shows that the decision of invalidity rests solely on the strike threat.[6]

We consider it neither necessary nor appropriate for us to extensively argue the right of labor generally to the use of economic pressure and the threat of strike. This court and Congress have too often recognized the right of labor to use economic pressure for the betterment of its condition as well as for "defensive" purposes for us to attempt to add anything to the knowledge of the court on this issue. Insofar as the Railway Labor Act bears on this point, it may be noted that that Act did not attempt to make strikes unlawful, but simply provides means to avoid them.[7] It requires negotiation and encourages agreement and nowhere invalidates agreements because economic

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6 Several awards of the First Division of the Adjustment Board involving other railroads had held that the use of train porters for braking duties violated the brakemen's agreements with the carrier. Five of these awards were urged upon the carrier during the negotiations leading up to the agreement of March 7, 1946, as a reason for agreement since the Adjustment Board had, in these awards, interpreted brakemen's agreements with respect to the disputed work (R. 226). Further, all of the cases on the strike ballot were not within the jurisdiction of the Adjustment Board. Case No. 1, a demand for cancellation of an agreement dated March 25, 1939, to which demand the carrier had not acceded, was such a case (R. 195). Thus, in the view of brakemen, resort to the Adjustment Board could not provide a solution to all the matters in dispute and, in the case of the controversy involved here, was unnecessary because of the earlier awards.

7 Washington Terminal Co. v. Boswell, 124 F. (2) 235, 247, Aff'd 319 U. S. 732; Railway Labor Act, Section 1, Fifth.

pressure entered into their making. It provided voluntary processes where agreement fails but did not prefer those processes over agreement or make resort to those processes compulsory. In short, it did not take away from labor the economic weapons possessed by it, but added remedies not previously available, the resort to which might eliminate the need for economic pressure.

The history of labor relations in the railroad industry clearly demonstrates the unwillingness of the carriers in the past to voluntarily negotiate and reach agreements with representatives freely selected by employees. Cf. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 558-9; Virginian Ry. Co. v. System Federation, 300 U. S. 515, 545-6. The Railway Labor Act and its amendments in 1934 had, as a prime objective, the protection of the right to organize and a compulsion to so negotiate and to agree if possible. Bearing in mind the conditions existing at the time of passage of the Act it is not reasonable to say that Congress intended it to operate as a denial of the right to use economic pressure in collective bargaining. Such a construction of the Act, instead of promoting agreement, would deprive labor of the economic strength gained through organization, which is essential to protect its legitimate interests and achieve agreement.

Nowhere in the Railway Labor Act is the right to strike or to threaten strike prohibited. Only where an Emergency Board is appointed (Section 10) is the right to strike limited for a 30 day period. The denial of a right so fundamental and so essential should not be implied.

We submit that the agreement of March 7, 1946, is valid as construed by the parties and that no grounds exist for holding it otherwise. It was in furtherance of a legitimate purpose of the craft of brakemen to secure for itself the work belonging to it and was brought about with the

lawful aid of economic pressure.[8] Its effect, as intended by the parties, should not be enjoined.

IV.

Injunctive relief in labor disputes such as this is prohibited by the Norris-LaGuardia Act and by decisions of this court.

The decision of the court of appeals grants injunctive relief in a dispute which the court finds to be between two crafts of employees over the right to perform certain brakemen's duties on the carrier's passenger trains. On the court's own findings, such equitable relief is beyond its authority as limited by General Committee, B. L. E., v. M.-K.-T. R. Co., 320 U. S. 323; Order of Railway Conductors v. Pitney, 326 U. S. 561; and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., sec. 101 et seq. General Committee denied equitable relief because of the non justiciability of representation disputes under the Railway Labor Act. Pitney held that until the complaining craft had established its own contractual rights to the work through award of the Adjustment Board it could not establish the absence of a remedy at law, prerequisite to equitable relief. The prohibitions in the Norris-LaGuardia Act are based on the public policy therein declared against the granting of injunctions in "labor disputes" except under circumstances and upon conditions not claimed to be found here.[9]

If the train porters were here asserting a justiciable claim of rights created by the Railway Labor Act for

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[8] Senn v. Tile Layers Protective Union, 301 U. S. 468, 481-2; 56 C. J. S., p. 153.

[9] A "labor dispute" and a case involving or growing out of a "labor dispute" as defined in Sections 13 (c) and 13 (a) of the Act, respectively, clearly covers the dispute here. These sections, together with Section 1, prohibiting injunctions, appear in Appendix, p. 31. Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50; United States v. Hutcheson, 312 U. S. 219; New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 561.

which no administrative remedy were provided, Steele v. L. & N. R. Co., 323 U. S. 192, would admittedly authorize equitable relief. That the controversy here does not present such a claim appears from the classification of disputes which the court there distinguished from the one before it, l. c. 204-5:

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, Cf. Switchmen's Union of N. A. v. National Mediation Bd., 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95; General Committee of Adjustment, B. L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323, 88 L. Ed. 76, 64 S. Ct. 146; General Committee of Adjustment, B. L. E., v. Southern P. Co., 320 U. S. 338, 88 L. Ed. 85, 64 S. Ct. 142; Brotherhood of R. & S. S. Clerks v. United Transport Serv. Employees, 320 U. S. 715, 816, 88 L. Ed. 420, 493, 64 S. Ct. 260, 435, or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration: General Committee of Adjustment, B. L. E., v. Missouri-Kansas-Texas R. Co., supra (320 U. S. 332, 337, 88 L. Ed. 81, 84, 64 S. Ct. 146). There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, Switchmen's Union of N. A. v. National Mediation Bd., 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95; and General Committee of Adjustment, B. L. E., v. Missouri-Kansas-Texas R. Co., supra. Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board."

The rights claimed by train porters here do not have their origin in The Railway Labor Act. Being members of a separate craft and not members of the craft of brake-

men they are not entitled by law to representation by petitioners. Their claim to representation by way of reclassification is not a matter of right, and is not justiciable, but may be submitted to the Mediation Board for determination. Their claims, as a separate craft, to the work in dispute likewise do not arise from the Act but from their agreements with the carrier and these are determinable by the Railroad Adjustment Board.

In connection with the contractual claims of train porters to the disputed work it should be noted that these claims are in no way prejudiced by the brakemen's agreement with the carrier. This could be a situation where a carrier has twice contracted for the same work, and like other persons in the same fix, it may have to live with its contractual obligations until contractual changes can be effected.

The contractual rights of brakemen cannot be made dependent on the absence of rights in train porters. The controversy here is not between brakemen and train porters as to which has superior rights to the work. While the performance of the duties in dispute exclusively by one craft would normally exclude the other from such performance, any contractual obligation of the carrier with respect to the other craft would not thereby be defeated. It was no defense to a contract action at common law that the defendant might be bound to another with respect to the same subject matter. We submit it was not the purpose of the Railway Labor Act to destroy substantive rights but only to provide administrative procedure for the determination of such rights.

Train porters have heretofore argued that the absence of equitable powers in the Adjustment Board to maintain the status quo pending its award rendered the administrative remedy inadequate and called for equitable relief (R. 6). This argument was disposed of in Pitney with

the observation that the Board may award back pay and order reinstatement of employment. A contrary holding would, of course, mean that nearly every claim filed with the Board would be accompanied by a court action for equitable relief pending award.

We submit that no reason exists why the prohibitions of the Norris LaGuardia Act and the decisions of this court should not be applied and equitable relief denied.

CONCLUSION.

This controversy involves a jurisdictional dispute, not a case of race discrimination. The existence of racial differences between train porters and most of the craft of brakemen cannot change the nature of the dispute. The settled law respecting jurisdictional disputes should be applied here, as it was applied by the district court. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

WAYLAND K. SULLIVAN,
Cleveland, Ohio,
W. DONALD DUBAIL,
CHARLES R. JUDGE,
St. Louis, Missouri,
Counsel for Petitioners.

APPENDIX.

Railway Labor Act, Section 1, Fifth, 45 U. S. C., Sec. 151, Fifth:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: **Provided, however,** That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission."

Railway Labor Act, Section 1 (a); 45 U. S. C., Sec. 151 (a):

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all

disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, Sec. 2; as added June 21, 1934, c. 691, Sec. 2, 46 Stat. 1186."

Railway Labor Act, Section 2; 45 U. S. C., Sec. 152;

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

"Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: **Provided,** (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: **And, provided further,** That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees

involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Railway Labor Act, section 3, First; 45 U. S. C., sec. 153, First:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Norris-LaGuardia Act, Section 1; 29 U. S. C., sec. 101:

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to

issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections."

Norris-LaGuardia Act, Section 13; 29 U. S. C., sec. 113:

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

WAYLAND K. SULLIVAN,
Cleveland, Ohio,
W. DONALD DUBAIL,
CHARLES R. JUDGE,
St. Louis, Missouri,
Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

I.

The theory upon which the Court of Appeals reversed the judgment of the District Court is completely abandoned by Respondent 1

II.

A craft, under the Railway Labor Act, need not conform to functional classification and results solely from the act of employees in organizing and selecting representatives 2

III.

The agreement of March 7, 1946, was not the result of racial prejudice but of the demands of brakemen for work belonging to their craft. All members of the craft, minority as well as majority, benefit from it.... 5

IV.

The National Railroad Adjustment Board is not an improper tribunal to hear train porters' contractual claims in view of the limited jurisdiction of the Board 7

Appendix 11

Cases Cited.

Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760..... 3

Brotherhood of Railroad Trainmen v. Templeton (8th Cir.), 181 F. (2) 527..... 6

Edwards v. Capital Airlines, 176 F. (2) 755, cert. den. 338 U. S. 885..... 9

Hampton v. Thompson (5th Cir.), 171 F. (2) 535..... 8

Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, cert. den. 334 U. S. 818..... 8

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33..... 7

Order of Railroad Telegraphers v. N. O. T. & M. R. Co. (8th Cir.), 156 F. (2) 1, cert. den. 329 U. S. 758.. 8

Order of Railway Conductors v. Pitney, 326 U. S. 561.. 6, 7

Senn v. Tile Layers' Protective Union, 301 U. S. 468, 481-2..... 7

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239.... 6

State ex rel. St. Louis-San F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849 8

Steele v. L. & N. R. Co., 323 U. S. 192, 202..... 2

Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 570-1..... 7

Washington Terminal Co. v. Boswell, 124 F. (2) 235, 249, aff'd 319 U. S. 732..... 9

Statutes Cited.

Railway Labor Act:
Section 1, Fifth..... 2
Section 3, First (i)..... 8, 9

Textbook Cited.

56 C. J. S., p. 153..... 7

Miscellaneous.

Fifteen Years Under the Railway Labor Act Amended and the National Mediation Board 1934-1949..... 3
General Order 27..... 5

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

I.

The theory upon which the Court of Appeals reversed the judgment of the District Court is completely abandoned by Respondent. In his brief he makes no effort whatsoever to sustain this theory. He seeks to sustain the result, but only upon the theories presented by him (Resp. Brief 45).

The theory of representation which Respondent mainly relies on is dependent entirely upon his assumption that "membership in a craft or class is determined functionally by the duties performed" (Resp. Brief 25). Train porters make no other claim to representation by Petitioner Brotherhood except on the basis of their performance of some braking duties.

It should be particularly noted that Respondent is not seeking a reclassification for purposes of future representation by Petitioner. This, as we pointed out in our main brief, would be a non justiciable issue. He is, instead, seeking a declaration that train porters have at all times been members of the brakemen's craft and have been entitled to representation by Petitioner since the enactment of the Railway Labor Act (Resp. Brief 24).

So far as train porters are concerned, the fact that they did not seek or desire such representation seems to make no difference whatever. Their position is that Petitioner is chargeable with a breach of fiduciary duty even though no fiduciary relationship has ever been recognized as existing or has ever before been claimed to exist.

The duty of representation to a craft minority which Respondent asserts exists only by reason of and arises in the Railway Labor Act. Steele v. L. & N. R. Co., 323 U. S. 192, 202. That this duty of representation is not controlled by function or functional classification is expressly provided in the Act. Section 1, Fifth, defining an employee as one who performs work defined as that of an employee in orders of the Interstate Commerce Commission, expressly provides "**that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action** * * *."

The term "craft" is not, itself, defined in the Act. This is because it was not intended to compel the creation of new craft lines based on function, but, rather "it was intended by Congress to adopt the designation of class or craft as determined by the then current working agreement between the railroad and particular groups or classes of its employees." Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760; See Petitioners' main brief, p. 19. Thus, **it is the action of employees in organizing that determines a craft and the duty of representation, not the functions of those employees.**

A craft, for purposes of representation, often comprises employees having vastly different functions and even, in some instances, employed in different departments of the railroad.[1] Yet a craft, so constituted, is nevertheless recognized as a craft because it is the result of the employees' act of organizing for the purpose of representation and bargaining.

Whatever meaning train porters may put upon the term "craft" in common usage, it is clear that the Railway Labor Act uses it to refer to a group of employees who have organized for the purposes of representation, and without regard to function. There can be no question here that train porters accepted the carrier's designation of them as a separate craft, and, as such, organized for the purpose of representation. The Railway Labor Act requires, therefore, that they be so recognized.

The craft status of train porters being the result of their own action without demand, request or even desire on their part for representation by Petitioner Brotherhood, the matter of their race, is, we submit, irrelevant. The failure to

1 See "Fifteen Years Under the Railway Labor Act Amended and the National Mediation Board 1934-1949," issued by the National Mediation Board, pp. 16-18, for a discussion of this and other problems of craft determination.

represent cannot be laid to racial prejudice, where there was neither a duty to represent nor a desire for such representation.

* * * * * * *

Respondent Howard's use of the term "negro passenger brakemen" in referring to train porters and "negro freight brakemen" in referring to negroes actually employed as brakemen creates a false impression with respect to both these groups.

So far as the train porters are concerned, the term "negro passenger brakemen" represents only a self-created title, one not recognized as having any application to them by anyone other than themselves and in no way controlling their craft status for representation purposes. The craft name of "train porter" was designated by the carrier at least forty years ago (as descriptive of the dominant function of the craft) and train porters have always been recognized by that title (R. 233). Individual train porters become such by reason of their employment in that name, and that in turn follows an application for employment as "train porter" (R. 227).[2]

With respect to negro brakemen, it should be understood that brakemen as such have both passenger and freight rights (R. 83). The carrier's use of negro brakemen exclusively on head end and swing jobs has resulted in them working only in freight service, since train porters generally performed head end braking duties in passenger service in the area in which negro brakemen are employed.[3] The agreement of March 7, 1946, if given its intended effect, would permit negro brakemen as well as white brakemen to bid in passenger jobs in accordance with their seniority.

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[2] Respondent Howard was originally employed as a brakeman in 1917, but, by reason of physical disability, he made written application for transfer to employment as a train porter (R. 33).

[3] The practice of not using negro brakemen as flagmen is solely the responsibility of the carrier based on local custom (R. 103). A proposed agreement covering this and other subjects (R. 98) was never executed or put in effect on this property.

III.

The agreement of March 7, 1946, was nothing more than an agreement by which a craft representative secured for members of the craft work that admittedly belongs to the craft. It was not the act of a governmental agency maliciously seeking the discharge of train porters on the basis of race.

The burden of Respondent's argument with respect to race boils down to this: That train porters suffered discrimination at the hands of the carrier in being designated as a separate craft despite the fact that, as part of their duties, they performed some braking functions. Therefore, Petitioner should have exerted its economic strength to overcome the opposition of the carrier and the acquiescence of the train porters themselves in this designation to have forced their inclusion into the craft of brakemen for the purposes of representation.

Neither the premise nor the conclusion of this argument is tenable. In arguing that the designation of train porters as a separate craft by the carrier was the result of racial discrimination they omit consideration of the significantly different treatment accorded negro brakemen and train porters by the carrier. Prior to Government operation of the railroads in World War I, negro brakemen received a substandard wage which was equalized with that of white brakemen by General Order 27. Following the return of the railroads to private operation the wages of negro brakemen was not thereafter reduced below that of white brakemen even though negro brakemen offered to accept such a reduction (R. 101). The wages of train porters were reduced. This difference in treatment could not have been based on race, since both negro brakemen and train porters are negroes. It was, we submit, in accordance with the fact that train porters had always constituted and been recognized as a different

craft, which recognition was in turn based on functional and other differences not related to race.

Even if the designation of porters as a separate craft were the result of racial discrimination by the carrier, however, it would not follow that the failure of Petitioner to represent them was a breach of fiduciary duty in the face of their acceptance of this designation. The very fact of their designation as a separate craft by the carrier indicates its opposition to their inclusion in the craft of brakemen. Their organization as a craft and selection of representatives in accordance with the Railway Labor Act without requesting or claiming representation by Petitioner conclusively establishes their acceptance of their craft status. Certainly, **the duty to represent must have some more substantial foundation than the mere belief by train porters that Petitioner, by a diversion of economic strength, could have forced their inclusion into the craft represented by it.**

We submit that the existence of racial conflict, involving others than train porters, cannot alone create a fiduciary duty to those to whom there has not otherwise existed such a duty. **If train porters were not negroes there would not be any duty to represent them on the facts of this case.** To argue that if they were not negroes the facts would be different is rank speculation.[4] Train porters seek here a discrimination in their favor by reason of their race. On no other basis can a judgment in this case go in their favor.

The argument that the agreement of March 7, 1946, was the result of governmental action for an improper purpose is wholly without merit. The right of labor to organize

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[4] The existence of jurisdictional disputes between crafts wholly or predominantly white is well known. Cf. Order of Railway Conductors v. Pitney, 326 U. S. 561; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239; Brotherhood of Railroad Trainmen v. Templeton (8th Cir.), 181 F. (2) 527.

and enter into agreements with its employer exists apart from statute and is in no way dependent on a congressional grant of power. Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 570-1; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33. That a craft may exert economic pressure to gain for itself the work claimed to belong to it has rarely been questioned; where it has, that right has been sustained. Senn v. Tile Layers' Protective Union, 301 U. S. 468, 481-2; 56 C. J. S., p. 153.

IV.

Respondent argues that the National Railroad Adjustment Board, First Division, is an improper tribunal for the consideration of train porters' claim because the labor organizations selecting the labor members of that Division do not admit negroes to membership and because four of the five organizations were parties to the agreement of March, 1928.

Whether this argument has any relevancy in the future depends on whether train porters assert contractual claims to the disputed work. So far as the present case is concerned they have expressly disclaimed any such claims (R. 17; Resp. Brief, 16).

This aside, however, the jurisdiction of the Adjustment Board is not made dependent upon the non-existence of conflicting or adverse interests in the membership of the respective divisions. Thus, in Order of Railway Conductors v. Pitney, 326 U. S. 561, the conductors who were there involved in a jurisdictional dispute with brakemen (represented by the Brotherhood of Railroad Trainmen) were required to secure a determination of their contractual rights by the Board even though the Brotherhood of Railroad Trainmen names one of the labor members of

the First Division. The reason for this is that the proceedings before the Board for the determination of contractual rights are against the carrier, not against another craft which may have an interest in the outcome. Railway Labor Act, Sec. 3 First (i).[5]

In the normal course of the Board's work there must, inevitably, be claims presented by groups not having direct representation on the Board and by groups not participating in the selection of representatives. That such claims may often involve conflicting interests of other crafts having such representation is obvious. The objections of train porters are no different than might be raised by any other group of employees where conflicting interests exist.[6] The courts of appeals of the 5th and 8th Circuits have rejected similar claims based on race, as has the supreme court of Missouri in a companion case to this one. Hampton v. Thompson (5th Cir.), 171 F. (2) 535; Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, cert. den. 334 U. S. 818; State ex rel. St. Louis-San F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849.

The Pitney decision indicates that the Board, in passing upon a claim by train porters, may consider the agreements of the brakemen as they relate to the same subject matter. This does not, however, convert the dispute into one between the two crafts. Cf. Order of Railroad Telegraphers v. N. O. T. & M. R. Co. (8th Cir.), 156 F. (2) 1, cert. den. 329 U. S. 758. It still remains a dispute between the porters

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5 The bipartisan makeup of the Board, equally divided between labor and carrier members, does not lend itself to the determination of disputes between crafts. The inevitable division of labor members in such case would permit the award to be dictated by carrier members according to self interest.

6 Respondent's argument that the train porters' case would go to a supplemental board having only two labor members, one of which is named by Petitioner, is incorrect. Cases not being handled by any of the four labor organizations participating in the supplemental boards are retained by the First Division (Resp. Brief, Appendix 18-19).

and the carriers involving an interpretation of the train porters' agreements.[7]

That such proceedings may result in conflicting contracts covering the same subject matter has been recognized by the courts and by the Board itself.[8] Since an award of the Board does not destroy the contractual rights of interested third parties, but only establishes the contractual rights of the actual parties, and is, in any event, not self executing, it is evident that the conflicting interests of the Board members need not, and, in practice, does not interfere with determinations on the basis of precedent and right. We submit that the alleged bias asserted by Respondent respecting the labor members of the First Division is not such as to warrant a holding in advance of a submission that the Board is not an appropriate tribunal to hear their claims. Cf. Edwards v. Capital Airlines, 176 F. (2) 755, cert. den. 338 U. S. 885.

Respectfully submitted,

WAYLAND K. SULLIVAN,
Cleveland, Ohio,

W. DONALD DUBAIL,

CHARLES R. JUDGE,
St. Louis, Missouri,

Counsel for Petitioners.

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[7] The jurisdiction of the Adjustment Board, as fixed by Section 3, First (i), is limited to dispute between "an employee or group of employees and a carrier or carriers." Note that "group" is singular, not plural, clearly indicating that each group of employees is entitled to the interpretation of its agreements in a separate proceeding.

[8] Cf. Washington Terminal Co. v. Boswell, 124 F. (2) 235, 249, aff'd 319 U. S. 732. The reasoning of the Board with respect to this question is stated in Award No. 2253 of the Third Division, H. Nathan Swaim, Referee, and in Award No. 15220 of the First Division, A. Langley Coffey, Referee, excerpts of which are included in Appendix hereto.

APPENDIX.

Excerpt—Award 15220, National Railroad Adjustment Board, First Division, March 25, 1952.

"It seems to us that this is a private quarrel between two contracting parties of the kind and character this Division is freequently called upon to settle and which can be settled without the intervention of third parties. If the two carriers have made overlapping contracts with different labor organizations, the relief is to be obtained through negotiations and not by seeking to have the Division uphold one schedule of rules, on claim of conflicting interests, at the expense of the other, when both were bargained for in good faith."

Excerpt—Award 2253, National Railroad Adjustment Board, Third Division, August 10, 1943.

Any award made in these cases could have no direct effect upon the third parties. Any such award could only directly affect the parties to the contract who have come before the Board and are parties to the dispute. No award made in these cases would, or could, order the third parties to do or to refrain from doing anything, or in any other manner directly affect their rights. The claims filed by the employees, in effect, say to the carrier, "You have contracted with us to let us do this work and you have broken your contract by letting others do it. We are asking that you be compelled to fulfill your contractual obligation to us." An award could only order the carrier to comply with the contract. The method of compliance is left to the carrier. It might comply in a manner which would not affect the third parties who have been doing work covered by the agreement. On the other hand, the carrier might, in complying with an award, take the work away from the third parties. The carrier, without any

award, might take this work away from such third persons at any time unless it has also contracted to let such third parties do it. If the carrier breaches a contractual obligation by taking work away from such third persons, they have their remedy either by a claim filed with this Board or by an action in court.

Intervention by such third persons in these claims filed by the Clerks' Organization could be of no avail. If this Board should find in these cases that the Carrier has breached its agreement with the Clerks, there must be an award in favor of the Clerks; the Board's sole function is the interpretation and application of the agreement. It cannot alter an agreement for the relief of either party, even though it might appear that the work was also covered by an agreement with the third parties. If, therefore, the third parties were permitted to intervene and were able to show that the work in question was covered by their contract, that fact could not alter our award, if we found that the work was also covered by the Clerks' contract. We see no way in which this Board, acting within its jurisdiction, could save a carrier who has executed two agreements, the scope rule of which agreements cover the same work; nor do we believe it was the intention of the Congress in such a case to permit the employees covered by one such agreement to intervene and be heard in a claim filed before this Board by the employees covered by the other agreement.

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Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

Brief of Respondent Simon L. Howard, Sr., In Opposition To Petition For Writ of Certiorari

VICTOR PACKMAN
St. Louis, Missouri
JOSEPH C. WADDY
Washington, D. C.,
Counsel for Respondent, Simon L. Howard, Sr.

HENRY D. ESPY
St. Louis, Missouri,
Of Counsel

Printed by Law Reporter Printing Co., 518 5th St., Washington, D. C.

INDEX

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	8
Preliminary	
I. The jurisdiction exercised by the Court of Appeals is consistent with the applicable decisions of this and other federal courts	9
II. There is no "jurisdictional dispute"	13
III. Cases cited by petitioners are not in point	16
IV. The decision is correct	18
V. The Norris-LaGuardia Act is an inapplicable afterthought	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

Bautista v. Jqnes, 155 P (2d) 343, 25 Cal. (2d) 746	18
Brotherhood of Railroad Trainmen v. Templeton, 181 F. (2d) 527, (8th Cir.), cert. denied, 340 U. S. 823, Rehearing denied, 340 U. S. 885	11, 20
Brotherhood of Locomotive Firemen & Enginemen v. Tunstall, 163 F. (2d) 289	9
Cromwell v. Benson, 285 U. S. 22, 76 L. Ed. 598	12
Dorchy v. Kansas, 272 U. S. 306, 311	18
Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U. S. 711, 89 L. Ed. 1886	17
General Committee, B. of L. E. v. Missouri, K. T. R. Co., 320 U. S. 323, 88 L. Ed. 76	16

Page

Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U. S. 232, 94 L. Ed. 22 ..... 9, 10, 11, 20
Hunter v. Atchison, Topeka & Santa Fe Ry. Co., 171 F. (2d) 594, 596 20
James v. Marin ' in Corporation, 25 Cal. (2d) 721, 155 P. (2d) 329 18
Missouri-Kansas-Texas R. Co. v. Randolph, (8th Cir.), 164 F. (2d) 4 17
Nord, et al. v. Griffin, 86 F. (2d) 481, 483 10
Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829 12
Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318 16
Reilly, J. E., Investment Co. v. C. I. R. 311 U. S. 55, 59, 85 L. Ed. 36, 40 19
Slocum v. Delaware, L. & W. R. Co., 339 U. S. 561, 94 L. Ed. 795 17
Steele v. L & N. R. Co., 323 U. S. 192, 89 L. Ed. 173 ..... 8, 9, 10, 20
Switchmen's Union v. National Mediation Board, 320 U. S. 297, 88 L. Ed. 61 17
Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131 ..... 9, 10, 18
Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 89 L. Ed. 187 10
Virginian R. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789 ..... 10, 12, 19

STATUTES

29 U. S. C., Section 101, et seq. 2, 19
45 U. S. C., Section 151, et seq. 2, 9

In The

Supreme Court of the United States

October Term, 1951

No. 458

Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,

Petitioners,

v.

Simon L. Howard, Sr., and St. Louis-San Francisco Railway Company, a Corporation,

Respondents.

Brief of Respondent Simon L. Howard, Sr., In Opposition To Petition For Writ of Certiorari

---

PRELIMINARY STATEMENT

Respondent, Simon L. Howard, Sr., files this brief in opposition to the granting of the Writ of Certiorari because there are not present in this case the special and important reasons that warrant the granting of the Writ.

OPINIONS BELOW

The opinion of the District Court (R. 267) is reported in 72 F. Supp. 695 and that of the Court of Appeals for the Eighth Circuit (R. 339) is reported in 191 F. (2d) 442.

JURISDICTION

The jurisdiction of this Court under Title 28 U. S. C., Section 1254(1) is conceded.

QUESTIONS INVOLVED

1. Whether in a suit brought to enforce rights granted by the Railway Labor Act and the United States Constitution the Court below exceeded its jurisdiction by declaring the *legal effect* of an agreement between a railroad company and a representative under the Railway Labor Act of a craft or class of employees, and in enjoining the parties from using the agreement to violate respondent's statutory rights.

2. Whether the injunction ordered by the Circuit Court of Appeals violates the Norris-LaGuardia Act.[1]

STATUTES INVOLVED

Statutes involved are the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sections 151, et seq., and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Section 101.

STATEMENT OF THE CASE

This is a class suit filed on March 29, 1946, by a Negro passenger brakeman (designated by his employer, St. Louis-San Francisco Railway Company[2] as "train porter"), on behalf of himself and all others similarly situated, against the "Frisco" and petitioners, Brotherhood of Railroad Trainmen,[3] the collective bargaining representative of the craft or class of brakemen on the "Frisco", and C. O. Carnahan, General Chairman of the BRT on the "Frisco" lines.

In the complaint, respondent sought injunctions restraining the "Frisco" and the BRT from abolishing the "train porters" jobs and from hiring white "brakemen" to replace them pursuant to an agreement, dated March 7, 1946, between the "Frisco" and the BRT; a declaratory judgment

---

[1] The petitioners (who did not appeal below, or file a motion for rehearing before the Appellate Court) raised the question of the Norris-LaGuardia Act for the first time in its petition before this Court.

[2] (Hereinafter called the "Frisco.")

[3] (Hereinafter called the BRT.)

that the said agreement was null and void and that a notice served by the "Frisco" on the "train porters" discontinuing their jobs and functions was inadequate and in violation of the Railway Labor Act, as amended, 45 U. S. C., Section 156. The District Court held, after a hearing on the merits, that the notices given the "train porters" were in violation of Sections 2-Seventh and 6 of the Railway Labor Act and enjoined the "Frisco" from abolishing the positions of respondent and his class under the notices that had been issued, and held further that it was without jurisdiction to determine the other issues involved in the case. Cross-appeals were taken to the Court of Appeals, 8th Circuit, by the respondents where the case was twice briefed and twice argued. On September 11, 1951, the Court in an unanimous opinion[4] affirmed the decree of the trial Court with respect to the invalidity of the notices and in all other respects reversed the decree, and remanded the cause with directions to enter an injunction as set out in its Opinion.

STATEMENT OF THE FACTS

In their eagerness to persuade this Court that the Court of Appeals had no jurisdiction to decide this cause, petitioners have presented an incomplete statement which gives a distorted picture of controlling facts. Inasmuch as the Court of Appeals was careful to point out (191 F. (2d) l.c. 449) that its disposition of the cause on its merits was based on *"the particular facts and their analysis, with the legal situation resulting therefrom"*, we shall restate the dominant facts as presented below.

At the trial, evidence was introduced that established:

Respondent is a Negro (R. 268) employed by the Frisco to perform the duties of head-end brakemen on passenger trains as well as the duties of "train porter" on said passenger trains. He spends 95% of his working time performing

[4] No opinion had been rendered on the first submission which was set aside some sixteen months later.

his head-end braking duties and the remaining 5% performing the duties of "train porter" (R. 20, 134-5). The only employees performing head-end brakemen's work, who are designated "train porters", are respondent and his class—all Negroes. (R. 284). They have been performing this work for more than 40 years. White employees performing head-end braking work on passenger trains are designated "brakemen", and are not required to perform all the duties of "train porter" (R. 284). Negroes performing head-end braking work are paid sub-standard wages, although they are required to perform the portering work as well (R. 42, 284). White men performing head-end braking work are paid considerably more for doing somewhat less work.

The BRT is the representative under the Railway Labor Act of the entire craft or class of brakeman employed on the "Frisco", but Negroes are excluded from membership in the BRT (R. 283), and excluded from employment as rear-end brakemen or flagmen (R. 98, 103).

For many years, the BRT has been claiming the head-end braking work performed by plaintiff and his class exclusively for white "brakemen" (R. 70, 286). As a matter of fact, the four operating Brotherhoods (Brotherhood of Railroad Trainmen, Order of Railway Conductors, Brotherhood of Locomotive Engineers, and Brotherhood of Locomotive Firemen & Enginemen) have for many years sought to eliminate the use of Negroes by the "Frisco" in train, engine and yard services. Their efforts culminated in an agreement March 14, 1928, whereby the carrier agreed that, *"in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed"* (R. 59, 60, 286). *In the same agreement, the four operating Brotherhoods,* including the BRT, recognized the right of Negroes then in service to the positions they were entitled to under schedule rules *and undertook to protect them from unfair action by any union* members aimed at

compelling them to abandon their positions or their elimination from employment (R. 60, 269).

But, despite the agreement of March 14, 1928, the BRT sought for many years to secure the braking jobs of the Negroes.

The evidence showed that the term "train porter" was merely a racial badge applying only to Negro passenger brakemen (R. 61, 97-99).

In World War I, while the railroads were under the control of the United States Government, the Director-General of the Railroads by Supplement 12 to General Order No. 27, changed the name of the position held by respondent and his class from "train porter" to "passenger brakeman", and thereafter, during Government control, respondent and his class were known as "brakemen" and paid as such the same as white men, although no change was made in their duties (R. 23, 141, 233, 284, 285).

During that period, BRT demanded that all *Negro workers* on passenger trains *receiving brakeman's pay should be on the same* seniority list with other brakemen, and that positions be assigned in accordance with seniority (R. 97, 99, 100), but manifested racial hostility in other ways.

However, when the railroads were returned to private management, on February 1, 1921, the "Frisco," by unilateral action and over the protest of the Negroes, changed the name by which they were known back to "train porters" and cut their pay nearly in half, without reducing or otherwise changing their duties (R. 24, 32, 145, 151, 285). It also designated one of the "train porters" General Chairman for the train porters and coerced the train porters one by one into individually ratifying the change of name and reduction in pay (R. 24, 34-35).

At that time the Negro "train porters" were unrepresented before management and had no organization. They later joined organizations for protection because they were

not admitted into the BRT (R. 86-87) and the BRT would not represent them (R. 41, 69, 75, 286).

The "train porter" does all the head-end braking work on his train, but white brakemen and train porters are never assigned to the same run at the same time (R. 131). However white "brakemen" and Negro "train porters" have been assigned interchangeably on the head-end of certain trains (R. 42). Taking off a train porter meant his replacement by a white brakeman (R. 154) to perform the same duties the train porter had been performing except cleaning up of cars and things of that nature (R. 131) which occupied only 5% of the train porter's time (R. 20).[5]

Certain Significant Findings

On December 21, 1945, BRT floated a strike ballot on the Frisco lines covering several unresolved disputes, which included:

> "Case No. 3. Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF Tex. Railway Co.; and claim that additional brakemen covered by and paid under the respective brakemen agreement should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945, be sustained" (R. 124-125).

The "Frisco" had previously rejected such demand on the ground "train porters are not doing anything now that they haven't done all these years" (R. 122, 130).

Pursuant to a request by the "Frisco" to the National Mediation Board, the President of the United States created an Emergency Board under the Railway Labor Act which held hearings in St. Louis January 11-18, 1946. The "train

[5] The cleaning duties are diminishing in importance because of vestibuled coaches, air-conditioning, sealed windows, and improvements in the habits of the traveling public (R. 134).

porters'' attempted to intervene and be heard but the Emergency Board refused permission to intervene or be heard (R. 213-215). The Emergency Board recommended that BRT and the ''Frisco'' submit cases 3 and 12 to the First Division of the National Railroad Adjustment Board (R. 216-219). The BRT refused and set a new date for withdrawal of its members from service (R. 128, 131, 220-221).

On March 7, 1946, under strike threat, the BRT exacted from the ''Frisco'' the following agreement (R. 221, 223):

> ''Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued.''

Thereafter, *by way of giving effect to said agreement,* the Frisco served notice on the ''train porters'' that their positions were being discontinued effective April 1, 1946, and they were directed to turn in their switch keys and coach keys (R. 25, 45, 225).

Shortly after the notices were sent out to the ''train porters'' and before April 1, 1946, the Frisco caused bulletins to be posted advertising for ''brakemen'' on all the head-end braking jobs that the Negroes had previously been performing (R. 49, 50).

The ''train porters'' wired the President and Secretary-Treasurer of the BRT on March 19, 1946, asking representation and to join the BRT, and for the BRT to set aside the March 7, 1946, Agreement (R. 53-54). They received no answer. They also appealed unsuccessfully to the National Mediation Board March 19, 1946 (R. 245) and March 20, 1946 (R. 252, 254) and to First Division of the National Railroad Adjustment Board (R. 251) before appellant Howard filed the instant suit.

The trial court found specifically that the carriers made the agreement solely because of duress and strike threats (R. 279-280, 287); that at no time were the ''train porters'' represented during the negotiations (R. 129, 288); that the

"train porters" were performing their duties satisfactorily (R. 288); that the "Frisco" desired to retain the services of the train porters prior to the agreement of March 7, 1946, and decided to abolish the position of "train porter" solely because it was uneconomical to retain them if "train porters" could not perform the head-end braking duties (R. 128, 279-280, 288).

ARGUMENT

The Circuit Court of Appeals held that under the particular circumstances of this case the only lawful effect of the Agreement of March 7, 1946, was a merging of the "train porters" into the "brakemen", thus casting upon the BRT the obligation of protecting the minority group (the former "train porters") equally with its own membership, in accordance with the principles of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 89 L. Ed. 173. It affirmed the decree of the District Court holding that the notices served on the "train porters" were in violation of the Railway Labor Act and ordered the BRT and the "Frisco" enjoined from using the said agreement for any purpose other than the merging of the two groups, but meticulously avoided any decision as to any rights, not related to the status created by the Agreement of March 7, 1946, the BRT might have for determination by the National Railroad Adjustment Board. Respondent contends that the decision of the Circuit Court of Appeals was right and that the Writ of Certiorari should be denied because:

I. The jurisdiction exercised by the Court of Appeals is consistent with the applicable decisions of this and other Federal Courts.

II. There is no "jurisdictional dispute".

III. Cases cited by petitioners are not in point.

IV. The decision is correct.

V. The Norris-LaGuardia Act is an inapplicable afterthought.

I. The Jurisdiction Exercised by the Court of Appeals is Consistent with the Applicable Decisions of This and Other Federal Courts

In this case respondent invoked the jurisdiction of the Court to enforce statutory and civil rights guaranteed to him and his class by the Railway Labor Act and the Constitution of the United States.

Under the Railway Labor Act Negro railroad workers have the rights to be represented fairly and impartially and to be free from employment contracts and practices that discriminate against them on the basis of race or color.

> *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 89 L. Ed. 173.
> *Brotherhood of Locomotive Firemen & Enginemen* v. *Tunstall*, 163 F. (2d) 289.
> *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 94 L. Ed. 22.

The Railway Labor Act forbids railroad carriers from changing the working conditions of their employees without first giving thirty days notice of the change.

> 45 U. S. C., Section 156.

The right to work for a living in a common calling, free from artificial interference, is a fundamental constitutionally protected right.

> *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131.

Inasmuch as the instant case was brought to protect the above-described federal statutory and civil rights which respondent alleged and proved were being violated and jeopardized by the actions of his collective bargaining representative under the Railway Labor Act and a railroad car-

rier, the Court below had, and properly exercised jurisdiction. That Federal Courts have jurisdiction of such causes of action is no longer open to question, for the decisions of this Court and other Federal Courts have clearly established their justiciability.

A suit to enforce the right to fair and impartial representation under the Railway Labor Act states a cause of action;

> *Steele* v. *L. & N. R. Co.*, supra.
> *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, supra.

and presents a federal question that the Courts of the United States have jurisdiction to hear and determine.

> *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 89 L. Ed. 187.

Obligations placed upon railroad carriers by the Railway Labor Act are enforceable in the Federal Courts.

> *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 789.

This Court declared in *Traux* v. *Raich*, supra;

> "It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the *personal freedom and opportunity* that it was the purpose of the Amendment to secure. (Citing Cases.) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Nord et al.* v. *Griffin*, 86 F. (2d) 481, 483, the United States Circuit Court of Appeals (7th Circuit) stated:

> "The right to earn a living and to continue in employment unmolested by efforts to enforce void enactments

or adjudications is entitled to protection, in the absence of an adequate remedy at law." (Citing *Truax* v. *Raich*, supra).

In exercising their jurisdiction over such controversies courts may consider the *effect* of collective bargaining agreements. This Court held in the *Steele* case, supra, that where such agreements are unlawful in terms or effect, Federal courts may act. In the *Graham* case, supra, this Court again passed upon the *effect* of a collective bargaining agreement negotiated by a labor union which discriminated against Negro firemen by denominating them as "non-promotable", while white firemen were "promotable" and found that "*the effect* of the agreements is to deprive them, solely because of their race, of rights and job assignments to which their seniority would entitled them." (Emphasis supplied.)

The Court took pains to restate, in the Graham case, l.c. 238, " . . . that the Statute which grants the majority exclusive representation for collective bargaining purposes, strips minorities within the craft of all powers of self-protection, for neither as groups or as individuals can they enter into bargaining with the employers on their own behalf. . . . And we held that abuse of its powers by perpetrating discriminatory employment practices based on racial considerations *gives rise to a cause of action under Federal Law, which Federal Courts will entertain and will remedy by injunction* . . . " (Emphasis supplied.)

In Brotherhood of Railroad Trainmen v. *Templeton*, 181 Fed. (2nd) 527 (8th Circuit) (Cert. denied 340 U. S. 823; rehearing denied 340 U. S. 885) the United States Court of Appeals had before it an action brought by "Messenger-baggagemen" against the Brotherhood of Railroad Trainmen to enjoin the enforcement of certain awards of the National Railroad Adjustment Board, and to have declared invalid certain letter agreements entered into between the Carriers (Atchison, Topeka and Santa Fe, and Panhandle

and Santa Fe Railroads) and the BRT. Among other things the Court upheld the conclusion of the trial court that it had jurisdiction to construe and determine the *legal effect* of the letter agreements, and upon a finding that said agreements are an application of illegal and void awards, it had the right to restrain and enjoin the enforcement or *"further carrying into effect of said agreements."*

On this question of jurisdiction it is also important to remember that the Court also had before it the question of whether the notices served on the "train porters" abolishing their positions were in violation of Section 6 of the Railway Labor Act, as amended. That question alone would have sustained the Court's jurisdiction because the giving of a thirty days notice of the change of rates of pay, rules and working conditions is a mandatory provision of the Railway Labor Act.

Cf. *Virginian Railway Co.* v. *System Federation, etc.*, 300 U. S. 515, 81 L. Ed. 789.

Even the trial court found that it had jurisdiction of this aspect of the case. It is a well-established principle of federal law that where a court has acquired rightful jurisdiction of the parties and subject matter it will retain it for all purposes within the general scope of the equities to be enforced.

Ober v. *Gallagher*, 93 U. S. 199, 23 L. Ed. 829.
Cromwell v. *Benson*, 285 U. S. 22, 76 L. Ed. 598.

It would indeed be a sad commentary on Justice if a Court of Equity would have to defer the granting of relief when irreparable injury to statutory and fundamental rights is claimed as a result of a railroad labor agreement until a non-judicial body some two or three years later, might tell what the *legal effect* was of the agreement. Such requirement would be tantamount to a sacrifice or obliteration of the rights involved.

II. There Is No "Jurisdictional Dispute"

As will be seen from a reading of its opinion (based on the particular facts and their analysis, with the legal situation resulting therefrom, l.c. 447, 448) the Court of Appeals saw through the strategy of the BRT in trying to produce for its members from the agreement advantages for as long a period as possible by seeking "to becloud the plain legal situation to which the agreement of itself gives rise, as set out above, by asserting in effect that the brakemen have other rights, outside and beyond those created by the exacted agreement . . . , and that this claim of rights should prompt a court of equity to ignore the results which it is undertaking to make the agreement produce . . . in other words the Brotherhood asks that, for a period of 2 to 2½ years . . . it be allowed to inflict upon the trainporters whatever consequences it is able to do, through the exacted agreement, by loosely calling the entire situation in its unrelated aspects, a jurisdictional dispute."

From a reading of the petition filed herein it is obvious that petitioner's main argument in this court for the allowance of the Writ of Certiorari is that the Circuit Court of Appeals exceeded its jurisdiction and decided a cause that should have been referred to the National Railroad Adjustment Board. It is equally obvious that they reach that conclusion by disregarding the basic facts and *assuming* that the cause constitutes a "jurisdictional dispute" between representatives of separate crafts as to which craft should perform the head-end braking functions on the "Frisco's" trains. Having made that assumption (See page 2 of the Petition herein under "Questions Presented"), petitioners then proceed to argue that the decisions of this Court precluded the Circuit Court of Appeals from deciding that assumed jurisdictional dispute. Respondent respectfully submits that since petitioner's premise is based upon an unsupported assumption their conclusion is likewise unsupported and without merit.

As the record shows, the facts in this case clearly disprove the existence of any dispute between a representative of the "train porters" and a representative of "brakemen", as to who should perform the head-end braking functions on the "Frisco". All parties concede that the work in question belongs to the brakemen's craft. This essential difference between the instant case and the ordinary "jurisdictional dispute" was clearly recognized by the Court below. After reviewing the facts of the instant case, it stated:

> "From the recitation preceding, it will be noted that the agreement does not involve, as in the ordinary situation of jurisdictional dispute, an attempted shift in some mere incident of work as between two continued classes of positions or in some mere segment of individual jobs as between two preserved crafts of employees. The agreement reached out to take over, by forced action, without regard to basis, the entire positional field of another craft, with the industrially inevitable, and so legally intended, result that the 40-year established and recognized separate craft would be pushed off the railway and cease to have existence."
>
> • • • • • • • •
>
> "Further repeating, the only right which the Railway recognized in the brakemen to occupy the train porters' field, in both its dealings and contractual consummation, was whatever the agreement itself had created. And the Railway's action in abolishing the position of train porter and terminating the employment of those holding that position was taken solely to make possible the creation and effectuation in the brakemen of such a right of occupancy as an obligation imposed upon it by the exacted agreement. *No dispute has ever existed or now exists between the Railway and the train porters as to the latter's right to continue to occupy their positional field, if the agreement in its making or its consequence, is invalid, so that the Brotherhood and its members would not be entitled to claim any exclusionary right on the basis of it.*" (Emphasis supplied.)

And further:

> "There is no contention by the train porters here that a merger of the two previous similar positions and crafts, with a proper recognition of the train porters' existing status and rights, could not validly be made to occur, through an agreement on the part of the Railway with the Brotherhood, such as is here involved. And in so far as the making of such a merger agreement might perhaps otherwise require previous notice by the Railway to the train porters of an intention to make, in order to give it validity under the Railway Labor Act, if such an objection were raised, the train porters do not undertake to interpose any such objection to the validity of the agreement as effecting a mere merger of the two positions and crafts. *They are willing that the agreement be allowed to have the normal legal effect of which it would be capable, of having assimilated their positional field and themselves into the brakeman's craft.* Also, they recognize that the Brotherhood is entitled to the status of bargaining representative for the merged crafts, by reason of the majorityship in number of its previous membership." (Emphasis supplied.)

When the Court of Appeals decreed the only lawful effect of the agreement of March 7, 1946, to be a merger of the trainporters into the brakemen, thus casting upon the BRT thenceforth (irrespective of its previous rights and obligations) the duty of protecting the minority group on an equal basis with its own membership, it was mindful of the "extraneous" issues which the BRT characterize as a "jurisdictional dispute", and was meticulous in defining the scope of the decree to be entered in order to preserve such alleged extraneous rights. In other words, the Court held that it was not necessary for it to consider any matter relating to any alleged jurisdictional disputes which might have existed prior to the Agreement of March 7, 1946; that irrespective of any rights that the BRT might have had prior to that agreement, no jurisdictional dispute between crafts

could exist after March 7, 1946, *because there was only one craft involved,* and that these other "nonrelated" claims could not deprive a Court of equity of jurisdiction to protect rights inuring to respondent and his class as a result of the agreement. Such a holding is in all respects consistent with reason and the decisions of this Court and when the BRT pitched its argument upon an assumed jurisdictional dispute which the Court found to be irrelevant it merely built the familiar straw man and then proceeded to knock him down.

III. Cases Cited by Petitioners Are Not In Point

The distinction between the facts upon which the court in this case based its decision and the cases relied upon by the petitioners is clearly established by the records in the cases cited.

In *General Committee, B. of L. E.* v. *Missouri,* K. T. R. Co., 320 U. S. 323, 88 L. Ed. 76, this Court held that a dispute between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as to which organization was the proper bargaining representative under the Railway Labor Act for the purpose of legislating with respect to the calling of emergency engineers, was non-justiciable because it required a determination of a matter referable to the National Mediation Board and did not involve a right created by Congress which was intended to be enforceable in the courts.

Order of Railway Conductors v. *Pitney,* 326 U. S. 561, 90 L. Ed. 318, involved the question as to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two accredited bargaining representatives under the Railway Labor Act, *where each union was claiming that its collective bargaining agreement* entitled it to supply certain conductors. This Court held that the in-

terpretation of the agreements was a matter for the National Railroad Adjustment Board.

In *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 561, 94 L. Ed. 795, the railroad company was seeking a declaratory judgment in a dispute between two unions *concerning the scope of their respective agreements*, each claiming for its members certain jobs in the carrier yards at Elmira, New York.

In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 88 L. Ed. 61, this court held that courts are without jurisdiction to review a determination of the National Mediation Board as to whether a specified group of the carrier's employees were entitled to choose a separate representative.

Elgin, Joliet & Eastern Railway Co. v. *Burley*, 325 U. S. 711, 89 L. Ed. 1886, involved the question as to whether a collective bargaining agreement could be effective to deprive railroad employees of individual rights reserved to them with respect to grievances.

Missouri-Kansas-Texas R. Co. v *Randolph*, (8th Cir), 164 F. (2d) 4, cited by petitioners in a footnote at page 7 of their petition is clearly distinguishable from the instant case.

In that case two collective bargaining representatives were contending for the same work, *each claiming that its respective collective bargaining agreement* entitled its members to the work. The Court held on those facts that a jurisdictional dispute existed. Contrasting those facts with the facts of the instant case, *where there is no dispute between representatives and the work involved is admittedly brakemen's work*, the distinction between the two cases becomes immediately apparent and supports the different results reached by the same Court.

Nothing contained in any of the above decisions conflicts with the holding of the court below, which reserved to the BRT its right to seek an administrative interpretation of

its collective bargaining agreement as to any claims which it might have had prior to the consolidation of the groups.

IV. The Decision Is Correct

Respondent submits that the decision of the Circuit Court of Appeals is founded on reason and established law and that the result reached is correct and protects the rights of all parties. There was ample factual bases to justify the result reached and the decision could well have been to the same effect for other and additional reasons. In fact, the Court of Appeals was mindful that it could have ruled on the merits in favor of the respondent herein because of a violation "of the fundamental right of the train porters not to be made to lose their jobs and employment through artificial interference on the part of the Brotherhood or anyone else. *Truax* v. *Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131" l.c. 446.

Another case that the Court could have relied on, if the decision below had turned on the interference with the fundamental right to work, is that of *Dorchy* v. *Kansas*, 272 U. S. 306, 311. There, this Court held that a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. Also see *James* v. *Marinship Corporation*, 25 Cal. (2d) 721, 155 P. (2d) 329.

There are limits on means employed in collective bargaining.

Bautista v. *Jones*, 155 P. (2d) 343, 25 Cal. (2d) 746.

The threat of a strike can only be used properly in connection with legitimate objectives of collective bargaining.

Again, the Court of Appeals, in a footnote, numbered 4, l.c. 445, pointedly implies that the decision could very well have turned on the race question alone, but since the trial court did not reach a consideration of that factual question, "and the case is being disposed of here on a legal basis that

would be controlling, regardless of what race might be involved, we need not further discuss the contention".

A substantial basis on which the Court could also have ruled against petitioners, amply supported by facts in the record, is that irrespective of the racial badge of "train porter" which distinguished Negro head-end brakemen from white men who were referred to as "brakemen", they were nevertheless of the same craft, *even prior to the Agreement of March 7, 1946.*

Regardless of the reason assigned the result is correct, and it is well established that where the result is correct the decision of a lower tribunal will not be disturbed even if a wrong reason is assigned therefor.

J. E. Reilly Investment Co. v. *C. I. R.*, 311 U. S. 55, 59, 85 L. Ed. 36, 40.

V. The Norris-LaGuardia Act Is an Inapplicable Afterthought

Petitioners urge in this Court for the first time that the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Section 101, et seq., deprives the Federal Court of jurisdiction toward the injunctive relief granted by the Court below. Respondent submits that such a proposition is not only incompatible with the purpose of the Act but also flies in the face of controlling decisions of this Court. This Act constituted a great advancement for the cause of labor, but it would be a pyrrhic victory indeed if it should be construed to deprive employees of an injunctive remedy to avert irreparable injury caused by the violation of other rights conferred upon them by subsequent labor legislation. That no such anamolous construction should be indulged in is plain in principle and has been so declared by this Court.

Respondent has alleged that the Brotherhood and the Railroad had violated mandatory duties imposed upon them by the Railway Labor Act. In the case of *Virginian Railway Co.*, supra, this Court held that the Norris-LaGuar-

dia Act does not apply to an injunction to enforce such rights, and that the mandatory provisions of the Railway Labor Act " . . . cannot be rendered nugatory by the earlier and more general provisions of the Norris LaGuardia Act." (300 U. S. 515 at 563). In *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, supra, the union, as here, attempted to avoid the full effects of the *Steele* and *Tunstall* decisions, supra, by contending, as they do now, that the Norris-LaGuardia Act operates to restrain federal courts from issuing injunctions to enforce the obligation to represent all members of the craft fairly. However, this Court, in clear and unmistakable language, expressly held the provisions of the Norris-LaGuardia Act inapplicable to a suit for injunctive relief against discriminatory representation by the statutory bargaining agent. The following excerpt is particularly pertinent to the instant case:

> "Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation by which there would be taken from them their seniority and ultimately their jobs. Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If in spite of the Virginian, Steele and Tunstall Cases (US) all supra, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. The District Court has jurisdiction to enforce by injunction petitioners' rights to non-discriminatory representation by their statutory representative." 338. U.S. 232 at 239.

Also see: *Brotherhood of Railroad Trainmen* v. *Templeton*, supra.

Hunter v. *Atchison, Topeka & Santa Fe Ry. Co.*, 171 F. (2d) 594, 596.

We submit that the foregoing decisions clearly demonstrate that the Norris-LaGuardia Act is not applicable to this suit.

CONCLUSION

It should be apparent from a reading of the Opinion of the Court of Appeals, and from the annotations of the Record in the Statement of Facts herein that petitioners have misconceived the basis for the Court's ruling. This Court has already gone on record in numerous cases that the Railroad Brotherhoods are not beyond the reach of the Law, and that they cannot through subterfuge or by the unbridled use of their economic strength deprive relatively helpless minorities of fundamental rights, and that racial hostility, no matter how artfully manifested by a statutory bargaining agent, will not receive the protection of the courts.

Respectfully submitted,

VICTOR PACKMAN
St. Louis, Missouri
JOSEPH C. WADDY
Washington, D. C.,
Counsel for Respondent,
Simon L. Howard, Sr.

HENRY D. ESPY
St. Louis, Missouri,
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

On Behalf of Respondent, St. Louis-San Francisco Railway Company.

EUGENE G. NAHLER,
JAMES L. HOMIRE,
CORNELIUS H. SKINKER, JR.,
ALVIN J. BAUMANN,
St. Louis, Missouri,
Counsel for Respondent, St. Louis-San Francisco Railway Company.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions involved	2
Statement	2
Summary of argument	6
Argument	7
I. This is a jurisdictional dispute and is not justiciable	7
II. The decision of the District Court should not be affirmed	8
Conclusion	13
Appendix	15
Railway Labor Act, 48 Stat. 1185, 45 U. S. C., secs. 151 et seq.	15
Sec. 1 (a), 45 U. S. C., Sec. 151 (a)	15
Sec. 2, First, 45 U. S. C., Sec. 152, First	15
Sec. 2, Seventh, 45 U. S. C., Sec. 152, Seventh	15
Sec. 3, First, 45 U. S. C., Sec. 153, First	16
Sec. 5, First, 45 U. S. C., Sec. 155, First	17
Sec. 6, 45 U. S. C., Sec. 156	18

Cases Cited.

Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760	7
Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. (2) 780	9

Brotherhood of Ry. & S. S. Clerks v. Nashville, C. & St. L. Ry. Co. (6th Cir.), 94 F. (2) 97, 99 7

General Committee, B. of L. E., v. Missouri-Kansas-Texas R. Co., 320 U. S. 323 ..... 8, 9

Order of Railway Conductors v. National Mediation Board, 113 F. (2) 531, 533 7

Pitney v. Order of Railway Conductors, 326 U. S. 561 ..... 3, 8, 9, 10

Shipley v. Pittsburg & L. E. R. Co., 83 F. Suppl. 722, 759 11

Singer Manufacturing Company v. Wright, 141 U. S. 696 12

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 .. 4, 8, 10

Southern Pac. Co. v. Joint Council Dining Car Employes, 165 F. (2) 26, cer. den. 333 U. S. 838 11

Standard Oil Co. v. United States, 283 U. S. 163 12

Switchmen's Union v. National Mediation Board, 320 U. S. 297, 301 9

Templeton v. Atchison, T. & S. F. Ry. Co., 84 F. Supp. 162, 170, 181 F. (2) 527, cer. den. 340 U. S. 823 11

Virginian Railway Co. v. System Federation, 300 U. S. 515 7

Statutes Cited.

Railway Labor Act, 48 Stat. 1185, 45 U. S. C., secs. 151 et seq.:

Sec. 1 (a), 45 U. S. C., Sec. 151 (a) 4

Sec. 2, First, 45 U. S. C., Sec. 152, First 4

Sec. 2, Seventh, 45 U. S. C., Sec. 152, Seventh 6, 8

Sec. 3, First, 45 U. S. C., Sec. 153, First 11

Sec. 5, First, 45 U. S. C., Sec. 155, First 11

Sec. 6, 45 U. S. C., Sec. 156 ..... 6, 8

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

On Behalf of Respondent, St. Louis-San Francisco Railway Company.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 267) is reported at 72 F. Supp. 695. The opinion of the Court of Appeals (R. 339) is reported at 191 F. (2) 442.

JURISDICTION.

The jurisdiction of this court, under Title 28 U. S. C., Section 1254 (1), is conceded.

STATUTES INVOLVED.

Statutes involved are the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., secs. 151 et seq. Pertinent provisions are printed in appendix hereto.

QUESTIONS INVOLVED.

1. Whether the matter in issue here is a jurisdictional dispute and is justiciable by the court.

2. Whether the decision of the District Court should be affirmed in toto.

STATEMENT.

In order to fully explain its contentions herein Carriers[1] feels it is necessary to enlarge upon the facts in the case set out in brief for petitioners.

For over 40 years train porters have been known as a separate class of employes (R. 284). They were unorganized and without representation as a group prior to 1921. Since that time they have been treated by the Carrier as a separate class of employes for representation purposes (R. 285-286).

It is known that seniority lists for brakemen have been in existence on the Carrier's lines for a long period of time, believed to be at least 60 years (R. 230). The present contract between Brotherhood and Carrier has been in effect, so far as brakemen are concerned, since March 15, 1920, to which amendments have been made (R. 231).

---

1 Respondent, St. Louis-San Francisco Railway Company, will be hereinafter referred to as "Carrier." Respondent, Simon L. Howard, Sr., will be hereinafter referred to as "Train Porters."

Petitioner, Brotherhood of Railroad Trainmen, will be hereinafter referred to as "Brotherhood." Petitioner, C. O. Carnahan, etc., will be hereinafter referred to as "Petitioner Carnahan."

For this period of more than 40 years train porters, in accordance with custom or orders of their employer, performed some or all of the duties of head-end brakemen on passenger trains; and, in addition, they also were required to keep the coaches clean in transit and assist the passengers off and on trains (R. 284).

Brakemen, serving as head-end brakemen on passenger trains, are not required to clean the cars or assist passengers (R. 284).

Under date of December 21, 1945, Brotherhood circulated a strike ballot among its members employed in train and yard service of Carrier. This strike ballot covered twelve causes of complaint and were denominated as "cases." Among these was Case No. 3, described as a complaint by the Brotherhood "against train porters being used to perform the duties of brakemen on passenger trains" on the lines of Carrier (R. 192-194, 287).

Under date of January 3, 1946, Petitioner Carnahan advised the Carrier that a strike of yard and road service employes under the jurisdiction of Brotherhood would be effective at 6:00 p. m., Sunday, January 6, 1946 (R. 196-197, 287).

On January 5, 1946, the President of the United States issued an executive order creating an Emergency Board, pursuant to Section 10 of the Railway Labor Act. Such Emergency Board held public hearings commencing on January 11, 1946, and concluding on January 18, 1946 (R. 198).

Under date of January 24, 1946, the Emergency Board rendered its report and recommendations (R. 212-219). The Emergency Board took notice of the decision of this court in Order of Railway Conductors v. Pitney, decided January 18, 1946, 326 U. S. 561 (R. 216-217). It commented

on the similarity of the basic factual situation and issues in that case and those presented to it. It suggested that there was available to the parties an administrative tribunal created by Congress and that it was clearly the intent and purpose of the Railway Labor Act that disputes of such character be determined there. It advised, referring to Cases Nos. 3 and 10 of the remaining 11 cases on the strike ballot, that "all of these cases should be processed for submission to the Adjustment Board unless settled on the property" (R. 218). Brotherhood indicated they would not follow the recommendations of the Board and that the strike as originally set was not cancelled, but merely postponed (R. 128).

Thereafter, negotiations were resumed between Carrier and Brotherhood on February 5, 1946, and continued to February 8, inclusive, with further conferences being held on February 18 and 19, 1946 (R. 220).

On February 22, 1946, Petitioner Carnahan advised Carrier that "withdrawal time for members of my organization would be effective 6:00 p. m., February 26, 1946" (R. 220-221).

Negotiations were again resumed, and under date of March 7, 1946, all twelve cases on the strike ballot were settled.[2]

The settlement with respect to Case No. 3 read:

> "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2,

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[2] "The evidence indicated that this contract was entered into by the Carriers reluctantly, and as a result of the strike threats" (R. 287, Finding of Fact No. 22; Cf. R. 131, 160, 279-280). One of the declared purposes of the Railway Labor Act is "To avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U. S. C., § 151a), and that Act makes it a duty to settle all disputes (45 U. S. C., § 152; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 242).

1945, where claims have been submitted to be paid" (R. 222).

Under dates of March 9 and 12, 1946, Carrier advised officers of the union representing Train Porters of the agreement made with Brotherhood, and further that:

> "Under this agreement we will, effective April 1, 1946, discontinue all train porter positions. We will employ chair car porters on such trains as in our opinion their services are necessary or required" (R. 224-225).

Carrier had notices posted that bids would be entertained for brakemen to apply for head-end braking work for certain passenger trains or "runs". Those eligible for these positions were men holding seniority as brakemen (R. 43-44; 132). Train Porters received notices that they should turn in their switch keys, fusees and all their train equipment pursuant to the disposition of Case No. 3 (R. 45, 49, 50, 51; 133).[3]

This action was then filed on March 29, 1946, resulting in a restraining order prohibiting Carrier from putting into effect said agreement of March 7, 1946 (R. 9). Following the issuance of said restraining order, a general notice was published to all trainmen and yardmen advising them of the restraining order and that such order left the Carrier no choice but to withhold compliance with the agreement of March 7, 1946, between the Carrier and the Brotherhood (R. 51-53).

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3 Deprivation of train porters of the "head-end braking work" left remaining to be performed on passenger trains only duties incident to care of passengers and cars en route. Persons in the classification of "chair car porters" are employed on some trains solely to care for passengers and cars, but are not required to perform head-end braking duties. "Chair Car Porters" are represented by the same union as "Train Porters" and are covered by the same agreement; therefore Carrier advised officers of that union it would employ chair car porters on trains where it deemed necessary or required (R. 224).

SUMMARY OF ARGUMENT.

The real issue in this case is whether train porters or brakemen shall perform the necessary "head-end braking" work on Carrier's passenger trains. Obviously, it is illogical and impractical to have two persons doing the same work at the same time, such as operating the same switch at the same time. Train Porters are not here seeking merely retention in the employ of Carrier, but as well the retention of the right to continue to perform "head-end braking" on Carrier's passenger trains.

Such issue is a jurisdictional dispute, and, therefore, is not justiciable under controlling decisions.

Notwithstanding, the District Court holds that Carrier was required under the sections 2-Seventh and 6 of the Railway Labor Act (45 U. S. C., §§ 152-Seventh and 156) to give Train Porters 30 days notice before putting the agreement of March 7, 1946, with Brotherhood into effect. The 30-day notice requirement is not applicable to jurisdictional disputes. A determination of whether Carrier violated the Railway Labor Act in this respect is not justiciable under Pitney v. Order of Railway Conductors, 326 U. S. 561. Neither the Act nor the contract with the Train Porters' union required such notice, and, further, it appears the question was moot. Consequently, Carrier urges that the decision of the District Court should not be affirmed in toto.

ARGUMENT.

I.

This Is a Jurisdictional Dispute and Is Not Justiciable.

In the Statement it is clearly shown that the "Train Porters" and the "Brakemen" each were a separate craft or class for collective bargaining purposes, and each had its own collective bargaining agent and contract of employment with the Carrier covering rates of pay, rules and working conditions.

It is indisputable that each craft or class was separately established and recognized as such in 1934, when the present Railway Labor Act was enacted. Carrier was required to recognize each craft as then organized and to deal with the representative selected by each such craft and with none other. Order of Railway Conductors v. National Mediation Board, 113 F. (2) 531, 533; Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760; Brotherhood of Ry. & S. S. Clerks v. Nashville, C. & St. L. Ry. Co., 94 F. (2) 97, 99; Virginian Railway Co. v. System Federation, 300 U. S. 515.

The Train Porters, for over forty years, have been performing head-end brakemen's duties as well as cleaning cars and assisting passengers (R. 284). For a long period of time (not specifically fixed in the record) controversy existed between the Brotherhood and Carrier concerning the practice of Train Porters performing the head-end braking work (R. 286).

Through the subsequent turn of events, Carrier made the agreement with Brotherhood that the "practice of train porters performing brakemen's duties would be discon-

tinued." The Train Porters, through this action and some preliminary steps, claimed the right to continue doing such work. It appears indisputable to Carrier that the question here involved is a jurisdictional dispute.

It is, in the words of this court, in General Committee, etc., v. Missouri-Kansas-Texas Railroad Company et al., 320 U. S. 323, 334-335, "an asserted overlapping of the interests of two crafts" which "necessitates a determination of the point where the authority of one craft ends and the other begins, or of the zones where they have joint authority." As such it is not justiciable. Order of Railway Conductors v. Pitney, 326 U. S. 561; Slocum v. Delaware, L. & W., 339 U. S. 239.

II.

The Decision of the District Court Should Not Be Affirmed.

The District Court held that (1) it had no jurisdiction to determine the question whether train porters should be classified as brakemen and represented by the Brotherhood; (2) the National Mediation Board had exclusive jurisdiction to determine questions of classification under the Railway Labor Act; (3) this was a jurisdictional dispute and that Congress had conferred exclusive power on the National Railroad Adjustment Board in such disputes; and (4) it was the duty of the carriers under their agreement with the train porters and under sections 2-Seventh and 6 (45 U. S. C., section 152-Seventh and 156) to give train porters thirty days notice (R. 288-289).

The holdings that the matter of classification of train porters as brakemen was not justiciable, and that the National Mediation Board had exclusive jurisdiction, are sustainable. General Committee, B. of L. E., v. Missouri-

Kansas-Texas R. Co., 320 U. S. 323. However, as stated in Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. (2) 780,[4] 784 (concurring opinion), the National Mediation Board has no power

> "to decide a jurisdictional dispute merely as such. It can do so only as an incident to settling a dispute as to who shall represent a craft or class. No such dispute is presented. No one questions the right of any representative to represent the class or craft it now represents. No one contends there is a new or separate class for which a representative should be selected. The only dispute is whether certain men, not enough to affect the representation of either craft or class, shall be represented with the one or with the other; or, possibly, whether work now being done by members of one craft shall be taken from them and given to members of another, again without affecting the representation of either. Consequently, the Board rightly held that it had no power to determine the dispute, and the judgment affirming this should be sustained."

Carrier is in accord with the holding that the matter involved is a jurisdictional dispute. See point I of Argument.

With respect to holding No. 4, that the Carrier was required to give thirty days notice to the train porters under the Railway Labor Act and its contract with them, (1) the court was without jurisdiction to determine that question; (2) no requirement of the Act or the contract required such notice; and (3) any questions concerning the same were moot.

In Order of Railway Conductors v. Pitney, 326 U. S. 561, this court held in a matter of jurisdictional dispute that

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[4] Cited: General Committee v. M.-K.-T. R. Co., supra, l. c. 336, footnote 11; Switchmen's Union v. National Mediation Board, 320 U. S. 297, 301.

exclusive jurisdiction to determine such dispute was lodged in the National Railroad Adjustment Board. This decision was strengthened by the subsequent decision of this court in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239. In the Pitney Case, supra, after referring to Sections 2-Seventh and Section 6 of the Act, the court said, l. c. 565-567:

> "These sections make it clear that the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements. * * * The court, therefore, had to interpret these contracts before it could find that § 6 had been violated. * * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. * * * Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. cannot show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand."

It is patent that the lower court clearly disregarded this decision of the Supreme Court in making this determination.

This being a jurisdictional dispute, Carrier was not required to give any notice under the Railway Labor Act, nor under its contract. Jurisdictional disputes arise out of the interpretation or application of agreements which are solely within the jurisdiction of the National Railroad Adjustment Board.

Section 2-Seventh of the Act provides that a carrier may not "change the rates of pay, rules or working conditions of its employes as a craft embodied in agreements" except in the manner prescribed in such agreements or in Sec-

tion 6 of the Act. Section 6 provides that carriers and representatives of employes shall give at least thirty days notice of an intended change in agreements affecting rates of pay, rules or working conditions, which notice shall fix the time for beginning of conferences between the representatives of the interested parties and which may ultimately involve the services of the Mediation Board.

Changes in rates of pay, rules or working conditions are within the jurisdiction of the Mediation Board [Section 155-First (a), idem.] and do not come within the jurisdiction of the National Railroad Adjustment Board.[5]

Furthermore, the contract with the Train Porters' union contains the following:

> "Rule 23. It is understood porters will be used only on such trains as the Company designates" (R. 191).

Carrier, therefore, under the plain wording of Rule 23 of the agreement, had the right at any time to use train porters on all, a part of, **or none** of its trains. Its action in advising train porters that their positions would be discontinued was no more than an election, under its contract, not to use train porters on any of its trains, effective April 1, 1946. Consequently, even under the contract, there was no change of a rule embodied in a contract involved, and, therefore, no obligation thereunder to give thirty days notice.

Furthermore, the questions pertinent to such notice were moot. After the notice was issued a restraining order was

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5 The National Railroad Adjustment Board's jurisdiction is limited to disputes "growing out of grievances or out of the interpretation or application of agreements" concerning rates of pay, rules or working conditions (Sec. 153, First (i), idem.). Southern Pac. Co. v. Joint Council Dining Car Employes, 165 F. (2) 26, cert. den. 333 U. S. 838. That Board does not have power to change, alter or amend an existing agreement. Shipley v. Pittsburgh & L. E. R. Co., 83 F. Supp. 722, 759; Templeton v. Atchison, T. & S. F. Ry. Co., 84 F. Supp. 162, 170, 181 F. (2) 527, cer. den. 340 U. S. 823.

issued in these proceedings by the District Court. Pursuant to that restraining order, the Carrier did not put into effect on April 1, 1946, the agreement of March 7, 1946; it posted notices advising its employes of the restraining order and its actions pursuant thereto. It withdrew bulletins of job vacancies addressed to brakemen and permitted the train porters to continue in their positions and perform all their duties thereunder. This situation is parallel to that in the case of Singer Manufacturing Company v. Wright, 141 U. S. 696, involving an attack on a license tax levied by the State of Georgia against vendors of sewing machines. While that case was pending the taxes were paid, and the court said, l. c. 700:

> "* * *, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which **we have neither the right nor the inclination to express an opinion. * * * The equitable ground for the relief prayed ceased with the payment of the taxes.**" (Emphasis supplied.)

Also in Standard Oil Co. v. United States, 283 U. S. 163 it was held that in the suit for injunction under the Sherman Act questions raised by the Government as to the validity of agreements between defendants became moot when the agreements were cancelled by the defendants at the request of the District Court before the entry of the decree, the court saying, l. c. 182:

> "**As the relief here sought is an injunction, and hence related only to the future, United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft** 239 U. S. 466, 475, **the alleged validity of such provisions has become moot.**" (Emphasis supplied.)

CONCLUSION.

The controversy in issue is a jurisdictional dispute, which is not justiciable. The District Court's decision should be reversed insofar as it held that Carrier was required under the agreement with train porters and under the Railway Labor Act to give thirty days notice.

Respectfully submitted,

EUGENE G. NAHLER,
JAMES L. HOMIRE,
CORNELIUS H. SKINKER, JR.,
ALVIN J. BAUMANN,
St. Louis, Missouri,
Counsel for Respondent, St. Louis-San Francisco Railway Company.

APPENDIX.

Railway Labor Act, Section 1 (a); 45 U. S. C., Sec. 151 (a):

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, Sec. 2; as added June 21, 1934, c. 691, Sec. 2, 46 Stat. 1186."

Railway Labor Act, Section 2; 45 U. S. C., Sec. 152:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions

of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Railway Labor Act, section 3, First; 45 U. S. C., Sec. 153, First:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First Division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Railway Labor Act, Section 5, First, 45 U. S. C., Sec. 155, First:

"First. Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this chapter) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this chapter, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Railway Labor Act, Section 6; 45 U. S. C., Sec. 156:

"§ 156. Procedure in changing rates of pay, rules, and working conditions.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an

intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this chapter, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, § 6, 44 Stat. 582, as amended June 21, 1934, c. 691, § 6, 48 Stat. 1197.)"

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 458

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT SIMON L. HOWARD, SR.

VICTOR PACKMAN
JOSEPH C. WADDY
Counsel for Respondents

HENRY D. ESPY,
WILLIAM C. GARDNER,
Of Counsel.

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
The Negro "train porter" and the white "brakeman"	4
Historical Background	5
Efforts of the B.R.T. to Eliminate Negroes from Employment in Train Service Culminating in Agreement of March 7, 1946	7
The Result of the Agreement and Events Leading Up to This Litigation	10
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. The Court Below Had Jurisdiction of This Cause of Action to Determine Enforceable Rights Arising Under the Railway Labor Act and the Federal Constitution and That Jurisdiction Cannot Be Defeated by Loosely Labeling the Situation Either a Jurisdictional Dispute or a Representation Dispute	12
A. The National Railroad Adjustment Board Has No Jurisdiction Over This Cause	16
B. The National Mediation Board Has No Jurisdiction Over This Cause	21
C. Respondent Has No Adequate Administrative Remedy	29
II. The Right to Work	38
A. The B.R.T. May Not Use Its Statutory Position and Power to Deprive Respondent of His Right to Work	38
B. The Right to Strike Is Not Absolute	41
III. The Norris-LaGuardia Act Is Inapplicable	43
IV. Conclusion	45

INDEX—(Continued)

	Page
APPENDIX	1
Exhibit I—Memorandum of Understanding, Etc.	1
Exhibit II—Letter Dated March 15, 1928	3
Exhibit III—Memorandum on Discriminations, Etc.	4
Exhibit IV—Letter Signed by General Manager Shaeffer	10
Exhibit V—Letter, Limit Brown to J. E. Hutchison	11
Exhibit VI—Letter from Carrier to Limit Brown	12
Exhibit VII—Letter, Limit Brown to J. E. Hutchison	12
Exhibit VIII—Rules Governing Selection of Labor Members to National Railroad Adjustment Board	13
Exhibit IX—Memorandum of May 9, 1949, re Adjustment Board Procedure	16

TABLE OF CASES

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881	42
Bausch Machine Tool Co. v. Hill, 231 Mass. 30	42
Bautista v. Jones, 25 Cal. (2d) 746, 155 P. (2d) 343	43
Brotherhood of Locomotive Firemen & Enginemen v. Tunstall, 163 F. (2d) 289	13, 22
Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. (2d) 780	23
Brotherhood of Railroad Trainmen v. Templeton, 181 F. (2d) 527	45
Butchers Union Co. v. Crescent City, 111 U.S. 746	38
Central Metal Products Corp. v. O'Brien, 278 F. 827	39
City of Richmond v. Deans, 37 F. (2d) 712	29
Dorchy v. Kansas, 272 U.S. 306	41
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711	35
General Committee, Etc. v. M. K. T. R.R. Co., Et Al., 320 U.S. 323	15, 17, 18
Georgia v. Pennsylvania R.R. Co., 324 U.S. 439	30
Graham v. Brotherhood of Locomotive Firemen & Enginemen, 328 U.S. 232, 94 L. Ed. 22	13, 14, 15, 35, 44
Great Northern R.R. Co. v. Merchants Elevator Co., 259 U.S. 285	30
Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229	39
Hunter v. Atchison, Topeka & Santa Fe R. Co., 171 (2d) 594	42, 45
Hurd v. Hodge, 334 U.S. 24, 92 L. Ed. 1187	40
James v. Marinship Corp., 155 P. (2d) 992 (Cal. App.)	40
Kerr v. Pratt Library, 149 F. (2d) 212	40
Louisville & N. R. Co. v. U.S., 282 U.S. 740	23
Meccana v. Wanamaker, 253 U.S. 136, 64 L. Ed. 822	45
M. K. T. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 188 F. (2d) 302	45
M. K. T. R. Co. v. Randolph, 164 F. (2d) 4	19

TABLE OF CASES—(Continued)

	Page
Moore v. Illinois Central R. Co., 312 U.S. 630	35
Nixon v. Condon, 286 U.S. 73, 76 L. Ed. 984	40, 41
Nord v. Griffin, 86 F. (2d) 481	14, 39
Order of Railway Conductors v. Pitney, 326 U.S. 561	15, 17, 18, 35
O. R. C. v. Swan, 329 U.S. 520	34
Rolax, Et Al. v. Atlantic Coast L. R. Co., Et Al., 186 F. (2d) 473	13, 15, 27, 29
Slocum v. Delaware, L. & W., 339 U.S. 239	17, 18
Smith v. Allwright, 321 U.S. 649	40, 41
State ex rel. St. Louis-San Francisco R. Co. v. Russell, 358 Mo. 1136, Cert. Denied, 338 U.S. 849	18
Steele v. L. & N. R. Co., 323 U.S. 192	13, 14, 15, 16, 30, 32, 35, 40
Switchmen's Union of N. A. v. National Mediation Board, 320 U.S. 297	15, 17, 21, 22, 27, 34, 35, 37, 40
Switchmen's Union of N. A. v. National Mediation Board, 135 F. (2d) 785	26
Texas & N. O. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 458	42
Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131	13, 14, 16, 39
Tumey v. Ohio, 273 U.S. 510	34, 35, 37
Tunstall v. Brotherhood, Etc., Et Al., 323 U.S. 210, 89 L. Ed. 187	14, 15, 27, 29, 35
Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 81 L. Ed. 789	14, 15, 45
Williams v. International Boilermakers, 165 P. (2d) 903 (Cal. App.)	40
Wills v. Restaurant Employees, 26 Ohio (N.S.) 435	42

Constitution

Fifth Amendment	2, 14, 37, 40

Statutes

Civil Rights Act, 8 U.S.C., Sections 41, 43	2, 37, 39
Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101, Et Seq.	2, 43, 44
Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sec. 151	2
45 U. S. C., Sec. 152-Ninth	21, 30
45 U. S. C., Sec. 153-First	16, 33, 37
45 U. S. C., Sec. 155	21, 30
45 U. S. C., Sec. 156	13

Miscellaneous

Monograph of the Attorney General's Committee on Administrative Procedure, Part 4	32
National Mediation Board Case No. R-218	23
University of Pennsylvania Law Review, Vol. 77, PP. 52, Et Seq., Mason, "The Right to Strike"	42

In The

Supreme Court of the United States

October Term, 1951

No. 458

Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

Simon L. Howard, Sr., and St. Louis-San Francisco Railway Company, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT SIMON L. HOWARD, SR.

OPINIONS BELOW

The opinion of the District Court (R. 267) is reported in 72 F. Supp. 695 and that of the Court of Appeals for the Eighth Circuit (R. 339) is reported in 191 F. (2nd) 442.

JURISDICTION

The jurisdiction of this Court under Title 28 U.S.C., Section 1254 (1) is conceded.

STATUTES INVOLVED

Statutes involved are the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. Sections 151 et seq., and the Norris-La-Guardia Act, 47 Stat. 70, 29 U.S.C., Section 101, et seq.; the Federal Civil Rights Act, 8 U. S. C., Sections 41 and 43, and the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is a class suit filed on March 29, 1946, by a Negro passenger brakeman (designated by his employer, St. Louis-San Francisco Railway Co.,[1] as "trainporter"), on behalf of himself and other employees similarly situated against the "Frisco" and petitioners herein, Brotherhood of Railroad Trainmen[2] (the collective bargaining representative of the craft or class of brakemen on the "Frisco") and its General Chairman, to enforce rights under the Railway Labor Act, and rights guaranteed to citizens of the United States by the Constitution and laws thereof.

In the complaint, respondent sought injunctions restraining the "Frisco" and B.R.T. from enforcing an agreement dated March 7, 1946 (negotiated in secrecy without notice to respondent), which was executed by the "Frisco" under strike threat by the B.R.T. and which read, "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties, will be discontinued * * *"

Respondent averred that B.R.T. in coercing the agreement violated its statutory obligation to the Negro brakemen in favor of white brakemen, and that B.R.T. and its members should be prevented from obtaining the benefits of such illegal and discriminatory action, and prayed that the "Frisco" should be enjoined from hiring white brakemen to replace them in accordance with said agreement.

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[1] Hereinafter referred to as "Frisco."
[2] Hereinafter referred to as B.R.T.

Respondent also sought a declaratory judgment that the said agreement was void and against public policy, in that it was the result of a conspiracy to deprive citizens of their right to a livelihood because of their race or color, and that a notice of less than thirty days served by the "Frisco" on the train porters was inadequate and in violation of the Railway Labor Act.

The District Court held, after a hearing on the merits (R. 288, 290), that the notices given the "train porters" were in violation of Sections 2-Seventh and 6 of the Railway Labor Act and enjoined "Frisco" from abolishing the positions of respondent and his class under the notices that had been issued, but held that it was without jurisdiction to determine whether the "train porters" should be classified as brakemen and represented by B.R.T. because Congress had conferred upon the National Mediation Board exclusive jurisdiction to determine all disputed questions concerning classification for purposes of representation under the Railway Labor Act, and further, that this case presented a jurisdictional dispute between B.R.T. and the "train porters" over which the National Railroad Adjustment Board had exclusive power.

It thereupon ordered the proceedings stayed so that respondent might proceed before the National Railroad Adjustment Board and the National Mediation Board for a determination of the "claims asserted by him" (R. 290).

Cross-appeals were taken to the Court of Appeals, 8th Circuit, by the respondents where the case was twice briefed and twice argued (the first submission was set aside without an opinion some 16 months later). On September 11, 1951, the court in an unanimous opinion affirmed the decree of the trial court with respect to the invalidity of the notices but in all other respects reversed the decree, and remanded the cause with directions to enter an injunction as set out in its Opinion.

STATEMENT OF FACTS

The special problems presented by this case can be fully understood only in the light of the historical background. In order that the Court may have a full and complete picture of the particular and controlling facts, respondent makes the following statement:

The Negro "Trainporter" and the White "Brakeman"

The term "train porter" is a racial badge applying only to Negro head-end passenger brakemen (R. 60-61, 97-99). The train porters are required by the "Frisco" to perform the duties of head-end brakemen on its passenger trains as well as the duties of keeping the cars clean while enroute and assisting passengers on and off the trains. The only employees required to perform both head-end braking duties and porters' duties are Negro employees. White employees performing head-end braking duties on passenger trains are designated "brakemen." Respondent spends 95% of his working time performing head-end braking functions and the remaining 5% performing the functions of porter (R. 20, 134-5). Negroes performing head-end braking duties are paid sub-standard wages (R. 42, 284). White men performing head-end braking duties are paid considerably more for doing slightly less work (R. 22).

The train porter[3] is a member of a passenger train crew and does all of the head-end braking work on the train to which he is assigned. White "brakemen" and Negro "train porters" are never assigned to the same run at the same time (R. 131); but white brakemen and Negro train porters have been assigned interchangeably on the head-end of certain trains (R. 42). The removal of a train porter from a train means his replacement by a white brakeman (R. 134) to perform the same head-end braking duties the train porter had been performing (R. 131).

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[3] Not to be confused with a chair car porter or a pullman porter who are not trainmen and who have no train operating functions.

One of the crafts or classes of employees on the "Frisco" is the craft or class of trainmen, also known as "brakemen." Said craft or class encompasses employees performing various braking duties. Among such sub-groups composing the craft or class are switchmen (yard brakemen), flagmen (rear-end brakemen), baggagemen brakemen (who handle baggage) and the employees performing head-end braking duties. The B.R.T. is the representative under the Railway Labor Act of the entire craft or class of brakemen (trainmen) employed on the "Frisco." Negroes are excluded from membership in B.R.T. (R. 283), and are excluded from employment as rear-end brakemen (flagmen) (R. 98, 103). At the present time Negro train porters and the white brakemen share the same educational standards, pass the same examinations and have equal responsibility regarding their braking duties (R. 264-265).

Historical Background

Respondent, Howard, and other Negro employees similarly situated have been performing head-end braking duties for "Frisco" for more than forty years. Prior to World War I it was the practice of Southern railroads never to pay Negroes the same wages as whites for the same work. Then the United States Railroad Administration issued General Order No. 27 in May, 1918, of which Article VI provided:

"Colored Firemen, Trainmen and Switchmen—Effective June 1, 1918, colored men employed as firemen, trainmen, and switchmen shall be paid the same rate of wages as are paid white men in the same capacities" (R. 147).

Supplement No. 12 to General Order No. 27 was issued December 2, 1918, to clarify the position of the Negro "train porter." It provided: "To carry out the intent of Article VI, General Order No. 27, and retroactive to June 1, 1918, it is ordered:

"1. Employees in a passenger train crew, except conductor and baggagemaster, qualified and regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly:

"(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

"(b) Use hand and lamp signals for the protection and movement of trains.

"(c) Open and close switches.

"(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

"(e) Compare watches when required by rule.

"2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

"3. This order shall not curtail the duties of employees heretofore classed as "train porters."

"4. This order shall not infringe upon the seniority rights of white trainmen" (R. 148)

This functional test by a governmental authority is the only one ever established to determine the classification of the Negro employees on the head-end of the passenger trains.

General Order No. 8, par. 5, United States Railroad Administration, had previously laid down the rule:

"No discrimination will be made in the employment, retention or conditions of employment of employees because of membership or non-membership in labor organizations" (R. 148).

Under these General Orders and Supplement No. 12 the Negro "train porters" without a change in duty were reclassified as passenger brakemen and paid brakemen's wages during the remainder of the time the railroads were under Federal control (R. 23, 122, 141, 233, 284-285).

B.R.T. in 1919 demanded that all colored men on passenger trains receiving brakemen's pay should be on the same seniority list with other brakemen, and that positions be assigned in accordance to seniority, not race (R. 97-99, 100).

On March 15, 1920, B.R.T. negotiated a basic working agreement covering rates of pay, rules and working conditions for *brakemen* on the "Frisco". The Negro head-end passenger brakemen worked under that agreement until the railroads were returned to private management, on February 1, 1921, when the carriers arbitrarily and over the protest of the Negroes, renominated the Negroes as "train porters" and cut their pay nearly in half, without reducing their duties (R. 24, 32, 145, 151, 285). The carrier designated one of the "train porters" General Chairman for the train porters and coerced the train porters one by one into individually ratifying the reclassification and reduction in pay (R. 24, 34-35).

At that time the Negro "train porters" were unrepresented before management and had no organization. The first organization (a small committee) was formed to try to obtain relief against the arbitrary action of the carrier, mentioned above. Their efforts in self help resulted in frustration. A suit for back wages and for reclassification filed by them as unorganized workers with the United States Railroad Labor Board dragged on and although lost on the back wage issue to date of the decision (March 5, 1924), the main issue of reclassification was expressly deferred for further determination (R. 147). The record is silent as to any ultimate decision.

Efforts of the B.R.T. to Eliminate Negroes from Employment in Train Service Culminating in Agreement of March 7, 1946.

For many years the B.R.T. and the other operating Brotherhoods (the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen,

and Order of Railway Conductors) have opposed the use of Negroes by the carrier in train, engine, and yard service; and on March 14, 1928, forced the carrier into an agreement that

> "in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed" (R. 59-61). (Respondent's Appendix, pp. 1, 2).

No Negroes have been hired as firemen or under job title of "brakemen" since March 14, 1928 (R. 23, 64, 66-67, 73). The Brotherhoods even refused to permit any Negroes to be hired during the emergency manpower shortage in World War II (R. 118-119). The number of Negro freight brakemen has fallen considerably as a result of the 1928 Agreement (R. 133).

In the past the B.R.T. made frequent efforts of one kind or another to displace the colored train porters (R. 105-106). On December 21, 1945, these efforts resulted in B.R.T. floating a strike ballot on the "Frisco" lines covering several unresolved disputes, which included

"Case No. 3. Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF Tex. Railway Co.; and claim that additional brakemen covered by and paid under the respective brakemen agreement should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945, be sustained" (R. 124-125).

The carrier had previously rejected such demand on the ground "train porters are not doing anything now that they haven't done all these years" (R. 122, 130).

B.R.T. also made a demand (Case No. 12) to take train porters off the head-end of troop trains where they were

doing no cleaning but only straight braking work (R. 38, 120-121, 125).

Pursuant to a request by the carriers to the National Mediation Board the President of the United States created an Emergency Board under the Railway Labor Act which held hearings in St. Louis January 11-18, 1946. The B.T.B.P.S.F. and R.E. Inc. (a Negro organization) attempted to intervene and be heard on behalf of the train porters but the Emergency Board refused permission to intervene or be heard (R. 213-215). The Emergency Board recommended that the B.R.T. and the carrier submit cases 3 and 12 to the First Division of the National Railroad Adjustment Board (R. 216-219). The B.R.T. refused and set a new date for withdrawal of its members from service (R. 128, 131, 220-221). As a result conferences were resumed and culminated in the agreement of March 7, 1946, above noted (R. 221-223), which gave rise to the instant case.

The B.R.T. did not demand the discharge of the "train porters" in so many words (R. 129, 288), but they did demand that additional brakemen be added to the crew to perform the braking duties theretofore performed by the "train porters" (R. 124-125) which constituted 95% of the "train porters" time and that those functions be taken away from "train porters" (R. 130, 20).

The trial court found specifically that the carrier made the agreement solely because of duress and strike threats (R. 279-280, 287); that at no time were the "train porters" represented during the negotiations (R. 129, 288), and that the "train porters" were performing their duties satisfactorily (R. 288). The carrier desired to retain the services of the train porters prior to the agreement of March 7, 1946, and decided to abolish the position of "train porter" solely because it was uneconomical to retain it if "train porters" could not perform the head-end braking duties

(R. 128, 279-280, 288). (Also see Opinion of Court of Appeals, R. 340, 343.)

The Result of the Agreement and Events Leading Up to This Litigation

On March 9, 1946, the carriers sent out notice that because of the agreement with the B.R.T., effective April 1, 1946, all train porter positions would be discontinued (R. 224). Respondent Howard received notice March 14, 1946, his job would be abolished April 1, 1946; and his run was bulletined for bid by white brakemen (R. 25). The "train porters" protested, and asked the carrier to suspend operation of the March 7, 1946, agreement. The carrier refused (R. 157-159).

The "train porters" wired the President, Secretary-Treasurer of the B.R.T. and Petitioner Carnahan, March 19, 1946, asking representation, to join the B.R.T., and for the B.R.T. to set aside the March 7, 1946, Agreement (R. 53-54). They appealed unsuccessfully to the National Mediation Board March 19, 1946 (R. 245), March 20, 1946 (R. 247-249), and to First Division of the National Railroad Adjustment Board (R. 251) before respondent Howard filed the instant suit.

SUMMARY OF ARGUMENT

The Court below had jurisdiction of this cause of action to determine enforceable rights arising under the Railway Labor Act and the Federal Constitution. That jurisdiction cannot be defeated by loosely labeling the situation either a jurisdictional dispute or a representation dispute.

Respondent is a Negro member of the craft or class of brakemen employed by the "Frisco" and has the right to be represented by the representative of that craft fairly, impartially, in good faith and without hostile discrimination. An action to enforce this right is justiciable and cog-

nizable in the Federal Courts. This dispute would never have arisen but for respondent's race.

Neither the National Railroad Adjustment Board nor the National Mediation Board has jurisdiction of this cause.

The sole jurisdiction of the National Railroad Adjustment Board is to interpret and apply the terms of collective bargaining agreements. Plaintiff seeks to enforce statutory rights, not contract rights. There is no "jurisdictional" dispute between two labor organizations necessitating the determination of the point where the jurisdiction of one craft ends and the authority of another begins.

There is no "representation" dispute necessitating the determination of craft or class within the jurisdiction of the National Mediation Board. All parties admit that the duties involved in the dispute come within the jurisdiction of the brakemen's craft and that the B.R.T. is the representative of that craft. The only question of representation involved in this cause is the refusal of the B.R.T. to give Negro brakemen fair and impartial representation. Such a dispute is for the courts; not the National Mediation Board.

Equity regards substance and not form.

The facts that respondent and others similarly situated bear the racial identification of "train porters" and have been discriminated against by the carrier for many years does not make them any less brakemen and certainly cannot justify the B.R.T. in making a further discrimination based on that discrimination; or in trying to eliminate them entirely from their employment.

Respondent has no adequate administrative remedy. Mediation and conciliation by the National Mediation Board would accomplish nothing. Self help is futile. The National Railroad Adjustment Board is an improper tribunal to hear and determine this cause because its set-up is so geared and manned that respondent would be taking his case

before the same persons against whom his complaint is made. Such a Board cannot satisfy the Constitutional requirement of due process.

Respondent seeks to protect his constitutional right to work and to follow a common calling. Unjustified interference with that right by third parties is actionable. While carrying on collective bargaining the bargaining representative under the Railway Labor Act is exercising governmental power and it may not use its position and power to force the employer to discharge respondent, solely on the grounds of race. Such action is void as being against public policy and is unconstitutional.

The right to strike is not absolute. The legality of a strike depends upon its purpose as well as the means employed. A strike to deprive citizens of the United States of their Constitutional rights is illegal. The courts have power to protect individual workers against the loss of their jobs resulting from abuse of statutory power by powerful labor unions.

The Norris-LaGuardia Act is not applicable to this case. That act may not be construed to deprive railroad employees of an injunctive remedy to prevent irreparable injury caused by the violation of rights conferred upon employees by subsequent labor legislation or of civil rights protected by the Constitution of the United States.

ARGUMENT

I. The Court Below Had Jurisdiction of This Cause of Action to Determine Enforceable Rights Arising Under the Railway Labor Act and the Federal Constitution and That Jurisdiction Cannot Be Defeated by Loosely Labeling the Situation Either a Jurisdictional Dispute or a Representation Dispute

In this case respondent invoked the jurisdiction of the Court to enforce statutory and civil rights guaranteed to

him and his class by the Railway Labor Act and the Constitution of the United States.

Under the Railway Labor Act Negro railroad workers have the right to be represented by the collective bargaining representative of their craft or class fairly, impartially, in good faith and without hostile discrimination, and to be free from employment contracts and practices that discriminate against them on the basis of race or color.

Steele v. *L. & N. R. Co.*, 323 U. S. 192, 89 L. Ed. 173.
Brotherhood of Locomotive Firemen & Enginemen v. *Tunstall*, 163 F. (2d) 289.
Graham v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 94 L. Ed. 22.
Rolax, et al. v. *Atlantic C. Line R. Co., et al.*, 186 F. (2d) 473.

The Railway Labor Act forbids railroad carriers from changing the working conditions of their employees without first giving thirty days notice of the change.

45 U. S. C., Section 156.

The right to work for a living in a common calling, free from artificial interference, is a fundamental constitutionally protected right.

Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131.

Inasmuch as the instant case was brought to protect the above-described federal statutory and civil rights which respondent alleged and proved were being violated and jeopardized by the actions of his collective bargaining representative under the Railway Labor Act and a railroad carrier, the Court below had, and properly exercised jurisdiction. That Federal Courts have jurisdiction of such causes of action is no longer open to question, for the decisions of this Court and other Federal Courts have clearly established their justiciability.

A suit to enforce the right to fair and impartial repre-

sentation under the Railway Labor Act states a cause of action;

Steele v. *L. & N. R. Co.*, supra;
Graham v. *Brotherhood of Locomotive Firemen & Enginemen*, supra.

and presents a federal question that the Courts of the United States have jurisdiction to hear and determine.

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 89 L. Ed. 187.

Obligations placed upon railroad carriers by the Railway Labor Act are enforceable in the Federal Courts.

Virginian R. Co. v. *System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 789.

This Court declared in *Traux* v. *Raich*, supra;

> "It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the *personal freedom and opportunity* that it was the purpose of the Amendment to secure. (Citing Cases.) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Nord et al.* v. *Griffin*, 86 F. (2d) 481, 483, the United States Circuit Court of Appeals (7th Circuit) stated:

> "The right to earn a living and to continue in employment unmolested by efforts to enforce void enactments or adjudications is entitled to protection, in the absence of an adequate remedy at law."

When the pleadings and the proof in this case are tested by the above well settled principles of law it is immediately apparent that this case falls within the general jurisdiction of Federal courts; and, unless there is present in the case

some factor either ousting or limiting that jurisdiction, the justiciability of the cause is beyond question.

Petitioners desperately seek to find such ousting or limiting factor by disregarding the plain nature of the *rights* which respondent seeks to enforce and loosely labeling the entire situation either a "representation" dispute or a "jurisdictional" dispute over which the administrative agencies created by the Railway Labor Act have exclusive jurisdiction. Respondent denies and the Record belies the relevancy of these contentions.

In this connection it should be pointed out that, in amending the Railway Labor Act in June, 1934, Congress did not confer on the administrative agencies created by the Act jurisdiction to determine *all* controversies arising under that Act.

Steele v. *L. & N. R. Co.*, supra.
Tunstall v. *Brotherhood, etc., et al.*, supra.
Graham v. *Brotherhood of Locomotive Firemen & Enginemen, et al.*, supra.
Virginian Ry. Co. v. *System Federations No. 40*, supra.
Rolax, et al. v. *Atlantic Coast L. R. Co., et al.*, 186 F. (2d) 473.

On the contrary, it is clear from the adjudicated cases that Congress has conferred on the National Railroad Adjustment Board and the National Mediation Board exclusive jurisdiction only over certain controversies incident to the administration of the Act.

General Committee of Adjustment, etc. v. *M. K. T. Railroad Co., et al.*, 320 U. S. 323.
Switchmen's Union of N. A. v. *National Mediation Bd.*, 320 U. S. 297.
Order of Railway Conductors v. *Pitney*, 326 U. S. 561.

Furthermore, resort to such agencies is not prerequisite to relief in equity where a hearing before them, if available, would not constitute an adequate administrative remedy.

Steele v. *L. & N. Railroad Co.*, supra.

When Congress determined the functions of these administrative agencies it did not confer upon them jurisdiction to adjudicate the right of a minority member of a craft or class to the fair and impartial representation due him by his collective bargaining representative. Such power was left within the general jurisdiction of the Courts.

Steele v. *L. & N. Railroad Co.*, supra.

Neither did Congress, nor could it, constitutionally authorize the collective bargaining representative of a craft or class to use its statutory position and power to prevent citizens of the United States, on the ground of their race or color, from continuing in their employment and earning a living in a common calling.

Truax v. *Raich*, supra.

A. The National Railroad Adjustment Board Has No Jurisdiction Over This Cause

The sole jurisdiction given the National Railroad Adjustment Board is to pass upon grievances and disputes arising under existing collective agreements.

45 U. S. C., Section 153.

In so doing, it merely interprets and applies the terms of those *agreements* in disputes between an employee or group of employees on the one hand, and a carrier or carriers on the other. Here it must be remembered that there is no agreement or contract to be interpreted *because respondent has not bottomed his claim upon any contract but upon the statutory right of fair and impartial representation due him by his statutory agent.* His rights do not stem from any contract but from the statute itself. Nor is respondent questioning the "jurisdiction" of the BRT over him and the brakeman's craft. On the contrary, he is *affirming* that jurisdiction and asking the court to enforce his personal statutory rights arising from that relationship.

In order to have a jurisdictional dispute within the contemplation of the Railway Labor Act there must be "an asserted overlapping interests of *two* or more crafts".

> *General Committee, B. L. E.* v. *M. K. T.*, 320 U. S. 323, 335.
> *Accord: Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 at 302-6.
>
> "It involves a determination of the point where the jurisdiction of one craft ends and where the authority of the other begins." 320 U. S., supra, l.c. 343.

This is not a case of *one labor organization* bringing an action against *another labor organization* in which the first labor organization contends that it is entitled to an exclusive monopoly or control of jobs which the other labor organization, in turn, claims for its members. This is a case where an individual railroad employee, for himself and other individual employees, contends that his collective bargaining representative failed to represent him fairly, impartially, in good faith and without hostile discrimination and used its federal statutory position under the Railway Labor Act to discriminate against him, solely on account of race, by forcing from his employer an agreement, which, if permitted to stand, would cause him to lose his employment.

It is immaterial to the issues of this case that respondent was at one time a member of a self-defense organization which, because of necessity, was set up by members of his race in a vain and futile attempt to protect rights that his collective bargaining representative would not protect. There is no parallel in the facts here and those involved in *Order of Ry. Conductors* v. *Pitney*, 326 U. S. 561, or in *Slocum* v. *Delaware, L. & W.*, 339 U. S. 239, or in *General Committee, B. L. E.* v. *M. K. T.*, supra. In each of said cases two separate unions were vying with each other for the benefit of their respective members. There was no adversary claim by an individual employee against his representative. In each case the dispute was between white or-

ganizations and did not involve any racial issues or other discrimination based on the accident of birth. Nor was the National Railroad Adjustment Board disqualified by reason of its make-up to determine those disputes as will hereinafter be shown with respect to this case.

In *General Committee, B. of L. E.* v. *Missouri*, K. T. R. Co., 320 U. S. 323, 88 L. Ed. 76, this Court held that a dispute between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as to which organization was the proper bargaining representative under the Railway Labor Act for the purpose of legislating with respect to the calling of emergency engineers, was non-justiciable because it required a determination of a matter referable to the National Mediation Board and did not involve a right created by Congress which was intended to be enforceable in the courts.

Order of Railway Conductors v. *Pitney*, 326 U. S. 561, 90 L. Ed. 318, involved the question as to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two accredited bargaining representatives under the Railway Labor Act, *where each union was claiming that its collective bargaining agreement* entitled it to supply certain conductors. This Court held that the interpretation of the agreements was a matter for the National Railroad Adjustment Board.

In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 561, 94 L. Ed. 795, the railroad company was seeking a declaratory judgment in a dispute between two unions *concerning the scope of their respective agreements*, each claiming for its members certain jobs in the carrier yards at Elmira, New York.

Nor are respondent's rights determined by the case of *State ex rel. St. Louis-San Francisco R. Co.* v. *Russell*, 358 Mo. 1136, 219 S.W. (2d) 340 (Cert. Denied, 94 L. Ed. 520). The facts in that case were not ruled on upon the merits;

they grew out of a different set of circumstances and the issues differed in many respects from those presented in this case. Furthermore, the opinion of the Missouri Supreme Court was based upon the reasoning of Judge Duncan, the trial judge herein. The authority cited was the opinion of Judge Duncan (72 F. Supp. 695), which has now been reversed by the Circuit Court of Appeals. In addition there is a curious and irreconcilable inconsistency between the Opinion of the trial court herein and his conclusions of law which renders questionable the soundness of result in the *Russell* case which followed it.

Nothing in the position taken herein by the respondent nor in the opinion of the Circuit Court of Appeals below conflicts with the decision of the Court in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. (2d) 4 (8th Cir.), where a Negro *labor organization* brought suit against a railroad and the Brotherhood of Railroad Trainmen, *another labor organization*, to restrain the railroad from cancelling a contract with plaintiff and to restrain the defendant from continuing to coerce or induce the railroad to breach or abrogate the contract of the Negro organization. In that case the employees claimed to be of a different craft and sought protection of their *collective bargaining contract* rights. The Court stated that the temporary injunction insofar as it ran against the carrier was based solely on the lower court's conclusion that the Brotherhood of Railroad Trainmen and its members were guilty of past tortious conduct. The Court of Appeals concluded that there was no tortious conduct on the part of the B.R.T. justifying the temporary injunction, and further, *that there was nothing in the record to indicate that racial considerations had anything to do "with this labor dispute."*

No amount of artifice on the part of the B.R.T. can blot out the ugly fact shown by this record that considerations of race formed the basis for the Agreement of March 7, 1946, and that if respondent had been of the white race this dis-

pute could never have arisen. Morey, the B.R.T.'s former General Chairman on the "Frisco" lines, made no bones about it:

> "Q. (Mr. Packman): And you wanted only the white men to be brakemen?
> A. (Mr. Morey): That is right" (R. 70).

Morey was asked why the BRT had never undertaken to represent the "train porters". He replied:

> "Well, the reason for it was, to begin with, it would be unfair to represent a fellow that you couldn't give membership to" (R. 75).

On September 18, 1926, J. E. Hutchison, Vice President of the Carrier, wrote to C. H. Baltzell, a division superintendent (R. 105-106), that

(Plaintiff's Exhibit 21)*

"Your letter September 17th relative to displacing colored porters on passenger trains.

"There has been for years a determined effort on the part of the train service employes to get the colored men out of employment on our trains and engines and they have done everything that they could to accomplish this. During the time of Federal control an interpretation of seniority was gotten from governmental source and applied to all the railroads, which made all of the men in train and engine service be handled on one seniority list. In view of the fact that local sentiment made it impossible for us to work a colored brakeman as a flagman it was necessary for the colored brakeman to always work ahead. The men tried by means of this seniority arrangement to crowd these men out of service and did crowd a good many of them out. This is just one of the many efforts.

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* Letter dated September 18, 1926, addressed to C. H. Baltzell, Superintendent, from J. E. Hutcheson, Vice President, St. Louis-San Francisco Railway Co.

"There have been frequent efforts of one kind and another made to displace the colored porters on the trains but the white men have never been quite willing to take over the work that the colored men do and whenever it came to an issue they have usually side-stepped it some way or another.

"Yours very truly,

"(Signed) J. E. HUTCHISON."

When the above evidence is considered with the Agreement of March 14, 1928 (R. 59-61), (Respondent's Appdx. pp. 1-2), where the big four railroad Brotherhoods, including the B.R.T., blandly admitted that for years they had been *demanding* that the carrier hire no more Negro brakemen or firemen, the intent and motives of the B.R.T. become crystal clear and reveals this dispute to be exactly what it is: A suit by a Negro member of the craft or class of brakemen against the representative of that craft or class to force that representative to represent him fairly, impartially, in good faith and without hostile discrimination. Of such a dispute, this Court held in the *Steele* case, supra:

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act * * * ". 270 U. S. 1, l.c. 204.

B. The National Mediation Board Has No Jurisdiction Over This Cause

Nor can the B.R.T. take advantage of the racial designation of respondent as "train porter" and, by using such designation, deny its responsibility to the Negro members of the craft or class, and convert this cause into a representation dispute referable only to the National Mediation Board.

The National Mediation Board has jurisdiction to handle three types of cases: (1) "Mediation" cases (45 U. S. C., Section 155-First); (2) "Interpretation" cases (45 U. S. C., Section 155-Second), and (3) "Representation" cases (45

U. S. C., Section 152-Ninth). No argument is necessary to illustrate that this is neither a "mediation" case nor an "interpretation" case. Indeed, petitioners do not even suggest it to be such. They content themselves with saying that this is a "representation" dispute and "not a question of color". In an attempt to substantiate this position they conveniently high-hurdle the substantial facts of the Record and emphasize that since the carrier has dubbed respondent a "train porter" and has otherwise discriminated against him for years by requiring him to perform more work for less pay, the B.R.T. may take advantage of that discrimination and eliminate him from the craft. In the case of *Brotherhood, etc.*, v. *Tunstall*, 163 F. 2d 289, Circuit Judge Parker answered that specious contention in the following appropriate language:

> "The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold. This seems so elementary as not to permit of argument. Such action by a bargaining representative clearly violates the rule laid down by the Supreme Court in the *Steele* case, supra, as to what is permissible in collective bargaining."

And this Court held in the *Steele* case, supra, that "discriminations based on race alone are obviously irrelevant and invidious". 323 U.S. 192, 203.

The Railway Labor Act gives exclusive jurisdiction to the National Mediation Board to determine *election representation disputes* where the question involved is *who shall be the representative of a craft or class* for the purposes of

collective bargaining. As an incident to that jurisdiction, it may determine who are members of the craft or class and eligible to participate in an election to select such representative.

The late Mr. Justice Rutledge, when he was an associate justice of the Court of Appeals of the District of Columbia, wrote a separate concurring opinion in *Brotherhood of R. Trainmen* v. *National M. Board*, 135 Fed. (2nd) 780, 783, in which he pointed out:

> "The Board's power to fix craft or class lines, however, by the explicit terms of the Act (Section 2, Ninth), is one which can be exercised *only as an incident to its authority to determine who is the representative of a craft or class. It is therefore only when the dispute requires an election or use of other appropriate means*, to settle this question *that the Board can fix craft or class lines* by exercising its power to designate who may participate in the election." (Emphasis ours.)

In that case the Court was considering a decision of the National Mediation Board, (Case No. R-218) in which that Board ruled as follows:

> "The authority of the Board under the provisions of Section 2, Ninth, of the Railway Labor Act to determine established crafts or classes of employees is limited to representation disputes requiring designation of employees who are eligible to participate in electing the representatives of the craft or class. Since the representative of the yardmen and switchtenders in the present case is known, acknowledged and not disputed, no election is warranted, and there is no need for designating the employee of the craft or class who may participate."

This ruling by the National Mediation Board has been considered law for more than a dozen years, and is entitled to great weight.

Louisville and N. R. Co. v. *U. S.*, 282 U. S., 740, 757.

In this case there is no question as to the identity of the representative of the brakemen's craft on the "Frisco." All parties admit that the B.R.T. is the representative. *The only question of representation involved in this case is the B.R.T.'s refusal to represent Negro members of the craft fairly, impartially, in good faith and without hostile discrimination—indeed, its refusal to represent them at all.* Respondent submits that such is not a representation dispute referable to the National Mediation Board, and this Court will not permit the B.R.T. to distort that language of the Act which gives freedom to employees to choose who shall be the representative into freedom to the representative to choose which members of the craft or class it shall represent.

Appellant Howard, at all times material herein, has been and is a passenger brakeman and the B. R. T. was under a statutory duty as collective bargaining representative under the Railway Labor Act for all men performing braking duties to give him fair representation and not to try to contract away his job rights.

The trial Court conceded that the "train porters" formed their separate organizations "actuated by motives of necessity because Negroes were not admitted to membership in the standard railroad organizations" (R. 277). The trial Court must have failed to note the record of the deposition of the Secretary of the National Mediation Board (Cole) that the fact that the "train porters" had a separate bargaining agent from the white brakemen did not constitute them a separate class or craft (R. 256, 257-258).

The mere fact that a man incidentally performs some minor duties other than those strictly within the craft or class does not take him out of the craft or class (R. 234, 236, 134, 135, 243, 284). The B. R. T. recognized the identity of class or craft in an earlier effort to gain control over the positions because:

(1) After Supplement No. 12 above had been issued the

Brotherhood requested that all colored men on passenger trains receiving brakemen's pay should be put on the same seniority list as other brakemen (R. 97-99, 100).

(2) In their case No. 3 on the strike ballot of December 21, 1945, the B. R. T. demanded that "additional brakemen covered by and paid under the respective brakemen agreements" should be used to perform the duties of brakemen now being performed by "train porters" (R. 124-125. To which we add "the same braking duties 'train porters' had been performing for time beyond memory" (R. 122).

(3) The basic agreement under which the white brakemen were working was the Agreement of March 15, 1920. The "train porters" on that date were classified as passenger brakemen under Supplement No. 12 above and had no separate agreement (R. 233.) They were therefore working under the brakemen's agreement. The only reason they did not continue to do so was because after the roads had been returned to private management on February 1, 1921, the carriers, over their protest, cut their pay and reclassified them by unilateral action from brakemen to train porters, and forced them to sign a separate agreement under duress of threat of discharge; but there was not one iota of change in their duties (R. 24, 32, 145, 151, 272).

Membership in a craft or class is determined functionally by the duties performed, not by the color of the worker's skin or his union affiliations (R. 135, 234, 284, 262-263).

Also:

Supp. No. 12, Gen. Order 27 (R. 137, 138);
Art. VI of Gen. Order 27 (R. 147).

This Court as a court of equity will regard the substance and not the form, and will not be deluded by misnomers of realities. The head-end brakemen who chance to be Negroes are none the less brakemen because they are designated "train porters". The essentials of the functions they per-

form make them members of the craft, irrespective of nomenclature. They are head-end passenger brakemen.

In *Switchmen's Union of North America* v. *National Mediation Board, et al.*, 135 F. (2d) 785 (C. of App., District of Columbia), page 793, Associate Justice Vinson (now Chief Justice of the Supreme Court of the United States) examined the meaning of the terms "craft" or "class" and concluded, "it was intended only in the occupational or functional sense. * * * " He further stated, "The term 'craft' has been defined as 'Those engaged in any trade, taken collectively.' The term 'class' has been defined as 'A group of individuals ranked together as possessing common characteristics or as having the same status.[1] The author of the bill, Mr. Eastman, explained the term 'craft or class,' as he had used it, to the Congressional Committee, as '*all* of the employees of the carrier, *no matter in what shop they were located, who did that particular kind of work.*' "[2]

Although the above case has been reversed for other reasons, the foregoing analysis is sound and remains unimpaired.

Mr. C. P. King, Assistant to the Chief Operating Officer of the "Frisco" Railway, who has been associated with the carrier for more than 36 years, testified with the greatest of frankness. The Court heard the following testimony, commencing page 233 (cross-examination by Victor Packman):

> "Q. But it is a fact that the railroad designated the job heading of train porters, isn't that so? A. Well, they had always been known by that and there was no dispute as to what it was.
>
> Q. Well, was it always during the war, the first war, when they were classified as passenger brakemen, these same men were reclassified as train porters?

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[1] See Webster's New International Dictionary (2d ed., 1939); 10 Words and Phrases, Perm. Ed., p. 322; 7 Words and Phrases, Perm. Ed., p. 427 (compare "class" as used in the law of wills).

[2] Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. (1934) 57.

(Footnotes 1 and 2 are the same as the Court's numbered 24 and 31.)

A. Well, there was that interval in there when they were carried as brakemen, but I think even then in speaking of them on the railroad, they usually called them train porters. So it has been the general practice ever since I have known anything about the railroad to refer to them as train porters.

Q. Would they still be the same men irrespective of of what you called them? A. Would they still be the same men? I suppose they would.

Q. Would the work they did still be the same irrespective of what you called them? A. Well, I hardly know how to answer that question, but the fact that they were called train porters didn't change their work, if that is what you are getting at.

Q. Would it make any difference what church they belonged to if they were performing the functions of a train porter? A. None in the world.

Q. Or what organization they belong to? A. No, sir.

Q. Or what union they belong to? A. No, sir.

Q. Or which union they did not belong to? A. No.

Q. Then it is the function that makes the craft and not the man, isn't that so? A. I would say that is so.

Q. And not the label or nomenclature? A. Oh, yes, you get started to calling a machinist a machinist and it is the work he does that makes him a machinist. I suppose if you started calling him something else——

Q. (Interrupting) Suppose we called him a mechanic. Would he be any less a machinist if he were doing the work of a machinist? A. I think not."

Plaintiff submits the facts in the Record establish beyond question that plaintiff and the other Negroes known as "train porters" are brakemen in fact and the Trial Court erred in refusing to so hold. These facts also establish that the term "train porter" is merely a racial badge pinned onto the Negro brakeman by the railroad company for the purpose of exploiting them and seized upon by the Brotherhood as a pretense to eliminate them from railroad service. There is here revealed a situation comparable in all essential respects to the factual situations in the *Steele*, *Tunstall*, *Graham* and *Rolax* cases, supra. Those cases

were brought by Negro firemen against their respective employers and the Brotherhood of Locomotive Firemen and Enginemen to set aside agreements which discriminated against the Negroes on account of race and to compel the Brotherhood to represent them fairly under the Railway Labor Act—the same right which the Negro brakemen are seeking to enforce against the B. R. T. in this case. Negro firemen were known by a racial badge as "non-promotable firemen"; white firemen were known as "promotable firemen." Here the Negro brakemen are known as "train porters"; white brakemen as "brakemen." There Negro firemen and the white performed the same duties; here the Negro brakemen and the white brakemen perform the same duties. There white firemen were required to take and pass promotional examinations and Negroes were not; here Negro brakemen are required to perform a few duties in addition to their braking work. There the contracts that the Negroes attacked destroyed the rights of "non-promotable" men; here the contract of March 7, 1946, destroyed the rights of "train porters." There the jobs that were taken from "non-promotable" firemen were given to white firemen; here the braking jobs of "train porters" were to be given to white brakemen.

In the aforesaid cases, as here, the Negroes are excluded from membership in the Brotherhood representing their craft. The fact (R. 286) that Negro trainmen in this case were forced from necessity to join a racial organization which signed separate employment agreements with the carrier in which they were categorized as "train porters," does not make them any less members of the craft or brakemen.

The evidence in this cause establishes beyond doubt that respondent and the class he represents are members of the craft of brakemen employed by the carrier. It follows that since the Brotherhood is the admitted representative of that craft, it was under a duty to represent respondent and his class fairly and impartially irrespective of union mem-

bership and without regard to irrelevant factors designed to camouflage racial discrimination. As the Fourth Circuit stated in the *Tunstall* and *Rolax* opinions, supra,

> "It is clear that a bargaining agent which denies membership to Negro members of a craft which it represents cannot justify in law or in reason the use of its power to force a contract from its employer, the effect of which is to discriminate against the Negro minority which it represents. *The effect of racial discrimination is not avoided by basing it ostensibly on some other factor.* In *City of Richmond* v. *Dean*, 4 Cir., 37 F. 2d 712, we held that a zoning ordinance which in effect discriminated on grounds of race would not be upheld merely because it was based on the legal prohibition of intermarriage, which was itself based on racial grounds. So here discrimination against Negro employees cannot be sustained merely because it purports to be based on promotability, which is itself based on race." (Emphasis ours.)

We submit that the above quoted language controls the instant case, for *discrimination against Negro employees cannot be sustained merely because it purports to be based on the designation of "train porter," which is itself based on race.*

To use a homely parable: The fact that a black horse is hitched, because of color, to a bigger load than a white horse, and, because of color, receives less hay at the end of a day, and is permitted to drink only from a separate pool, does not make it any less a horse.

C. Respondent Has No Adequate Administrative Remedy

We strenuously urge that neither the National Mediation Board nor the National Railroad Adjustment Board has any jurisdiction over this cause. Nor do we see how a hearing before either of these agencies, if available, would provide an adequate remedy.

This Court has limited the doctrine of prior resort so as

to make its applicability dependent upon (1) the nature of the question to be presented and (2) the adequacy of the administrative remedy. Thus it would seem that only those questions which require the skill of administrative specialists and the exercise of specialized judgment should be placed beyond traditional judicial scrutiny and relegated for initial determination by an administrative agency.

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285.

And where the administrative remedy is inadequate, or the failure of the court to exercise jurisdiction would result in a sacrifice or obliteration of the right involved, prior resort to the administrative agency will not be required.

Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439.
Steele v. *L. & N. R. Company*, supra.

The National Mediation Board is a board of conciliation and mediation. 45 U.S.C. sec. 155). It has no powers of adjudication, except where it is called upon to determine a dispute as to representation (45 U.S.C. section 152-Ninth), or where it is called upon to interpret a collective bargaining agreement negotiated under its auspices. (45 U.S.C. section 155-Second).

Negro brakemen or other operating employees are in no position to rely on the forces of conciliation and mediation. Their numbers are so small they have no bargaining position or economic power. According to the 1940 Census, vol. III, p. 88, Table 62, there were a total of 107,432 railroad brakemen in the United States, of which 2,739 were Negroes; 43,851 locomotive firemen of whom 2,263 were Negroes.

It is futile for Negroes to invoke self-help; they must rely upon protection of Government to secure their job rights in the railroad industry. For the reasons shown above it can only be done through the judicial process in protection of rights established for them as individual workers

under the Railway Labor Act, the Federal Civil Rights Act, and the Federal Constitution.

Resort to the National Railroad Adjustment Board by respondent would merely cause respondent unnecessary delay and expense which he and the members of his class can ill afford. (Cf. Opinion of the Circ. Ct. of Appeals) (R. 339, 347-348). As already pointed out respondent claims no rights under a collective bargaining agreement for the Adjustment Board to interpret. Furthermore, the Adjustment Board is disqualified from passing on this case. It would not be an adequate administrative tribunal for adjudication of respondent's complaint even if it had jurisdiction over the issues and had the powers of a court of equity.

The Adjustment Board, down to the Railway Labor Act of 1934 was purely a creature of agreement between the carriers and their employees. The compulsive features of jurisdiction were imposed by the Act of 1934, which changed the character of the Board and its awards from the area of consent to government compulsion.

The 1934 Act sets up a permanent National Railroad Adjustment Board blanketing the industry, gives it statutory jurisdiction and makes its decision final and binding on *both parties to the dispute*, except as to a money award. Yet the Act, after designating the Board to consist of 36 members, equally divided between carriers and "labor organizations of employees, national in scope," leaves the method of selection, term, amount of compensation up to the carriers and the "national labor organizations." (Section 3).

Unorganized employees and employees outside the "national labor organizations" are given no recognition and no chance to participate in the selection of Board members. The "national labor organizations" have dominated the First Division to such an extent that the Division long refused to accept and docket a complaint from an employee unless it was brought to the Division by the employee's craft representatives.

See *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, at p. 205. Monograph of the Attorney General's Committee on Administrative Procedure, Part 4: "Railway Labor, the National Railroad Adjustment Board, the National Mediation Board," at p. 7.

Twenty-five years before the contract of March 7, 1946 was executed, the Negro "trainporters" on the Frisco filed their case with the United States Railroad Labor Board seeking relief against exploitation and the arbitrary manner in which the Frisco was treating them. Decision was rendered March 5, 1924 (Decision No. 2181—R. 139-156), and the supporting opinion of Board Chairman Ben W. Hooper twenty-two years before the contract of March 7, 1946, anticipates all the arguments against sending these Negro trainmen to the National Railroad Adjustment Board. He said:

> "To give legal sanction to this discrimination certain representatives of these labor organizations have prepared and had introduced in the Congress of the United States a bill which provides that the adjustment boards which it sets up shall contain representation from the standard organizations alone. Inasmuch as these standard organizations exclude from their membership all colored men, the necessary result of the proposed measure is to legalize an ironclad act of exclusion against colored railway employees.
>
> "Whatever discriminations may be practiced by organizations of individuals they should not and cannot constitutionally be indulged in by a governmental body, legislative or administrative. These observations are made with the fullest recognition of the merits of these great labor organizations, but with a keen realization of the necessity of protecting the rights of minorities" (R. 155).

The argument Chairman Hooper made in 1924 is even more true today. The First Division of the Board which

has exclusive jurisdiction over all trainmen and brakemen is composed of 10 members: five carrier representatives and five labor representatives (R. 164). The five labor representatives come from and are officers of the following five unions, and no others:

Brotherhood of Locomotive Engineers;
Brotherhood of Locomotive Firemen & Enginemen;
Brotherhood of Railroad Trainmen;
Order of Railway Conductors;
Switchmen's Union of North America.

These labor members represent their respective unions on the Division (R. 166), and *each one of these unions bar Negroes from membership solely because of race.*

In addition the big-four Brotherhoods (BLE, BLF&E, BRT and ORC), as noted above, are on record barring the employment of Negroes as brakemen and firemen *on this particular railroad* (Memorandum Agreement of March 14, 1928, R. 59-61) (Respondent's App. pp. 1-2). The unions pay the salaries of their own representatives on the Division, and the member has no fixed term but is recallable at any time (R. 165; 45 U. S. C., sec. 153). Under the Railway Labor Act the decision of the Adjustment Board covering allocation of duties under a collective bargaining contract is *final* and not subject to judicial review (45 U. S. C., sec. 153, First—m).

It may be argued that the Court has no right to anticipate that an administrative agency will not render justice, but it is entirely unrealistic, and flaunts all the precedents in our law which hold that where the source from which the court, jury or administrative body is drawn is contaminated, one does not have to show bias in the individual officer, but the entire panel is thrown out; and proceedings before it after challenge made and proved is *coram non judice*. Be it noted there is no provision in the Act for substitution of members.

It is therefore apparent that the First Division of the

Adjustment Board set up by Statute in outline only and manned by members fifty percent selected by and from national labor unions barring Negroes from membership and with persistent anti-Negro records, cannot be permitted to be a "kangaroo court" sitting on and deciding cases adversely affecting the job rights of these outlawed Negro workers for the direct benefit of one or more of the unions represented on the Division. The action of the Division under such circumstances becomes prohibited governmental action which neither the members of the B.R.T. nor the carrier can claim the benefit of.

We submit, moreover, that the fact the Brotherhood of Railroad Trainmen's representative is paid by his union and subject to recall at will gives him a *direct interest* in the controversy so as to disqualify him within the meaning of *Tumey* v. *Ohio*, 273 U. S. 510. And since the Act requires all the members of the Division to participate in the decision and makes no provision for alternate or substitute members, the disqualification of the B.R.T. stymies the entire Division and it must grind to a halt without deciding a case which never should be brought before it (45 U. S. C., sec. 153). *Cf. O.R.C.* v. *Swan*, 329 U.S. 520.

This Court in the *Steele* case took judicial notice of the inadequacy of the Adjustment Board to give constitutional "due process" in cases of this kind.

We quote from 89 L. ed. 185:

> ". . . Further, since Sect. 3, First (c) permits the national labor organizations chosen by the majority of the crafts to 'prescribe the rules under which the labor members of the Adjustment Board shall be selected' and to 'select such members and designate the division on which each member shall serve,' *the negro firemen would be required to appear before a group which is in in large part chosen by the respondents against whom their real complaint is made.* In addition Sect. 3, Second provides that a carrier and a class or craft of em-

ployees, 'all acting through their representatives, selected in accordance with the provisions of this Act,' may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. *We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy.* Cf. Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243." (Emphasis ours.)

In spite of the restrictions placed by the Railway Labor Act of June 21, 1934 on judicial relief, this Court has nevertheless been able to take jurisdiction to protect minority workers whose individual rights are opposed by the dominant railway labor union in the area of controversy.

Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U. S. 711;
Steele v. *L. & N. R. Co.*, 323 U. S. 192;
Tunstall v. *L. & N. R. Co.*, 323 U. S. 210;
Graham v. *Brotherhood of Locomotive Firemen and Enginemen*, 328 U. S. 232, 94 L. Ed. 22;
Cf. Moore v. *Illinois Central R. Co.*, 312 U. S. 630.

Even the cases which restrict judicial relief provide that where constitutional considerations are involved, or there is a threatened sacrifice or obliteration of a right created by Congress to protect the interests of individuals or the public, a court of equity can intervene.

Switchmen's Union of N.A. v. *National Mediation Board*, 320 U. S. 297, 300-301;
Order of Railway Conductors v. *Pitney*, 326 U. S. 561, 566.

In the instant case the constitutional guaranty of due process is involved in forcing the Negro head-end passenger brakemen (called "trainporters" because of color) to submit their complaint to the First Division of the National Railroad Adjustment Board for a definitive interpretation of their agreement and employment relation with the carrier in their claim to continue performing the head-end braking functions on respondent carrier's passenger trains.

Respondent attaches Exhibit VIII in his appendix hereto, and asks the Court to take judicial knowledge thereof as a public document filed with a Federal agency under the Railway Labor Act,[1] of the rules adopted by the Railway Labor Executives Association in 1934 governing the selection and assignment of the labor members of the National Railroad Adjustment Board. These Rules show that the only labor organizations which can place members on the First Division are the five operating unions—all of which exclude Negroes from membership and four of which (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record of persistent hostility to the use of Negroes as brakemen or firemen on *this very carrier* property.

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[1] Exhibits A and B hereto are taken from the files of the National Mediation Board and certified correct under its seal and the signature of its Secretary. Section 5 Third (f) of the Railway Labor Act, 45 U.S.C. sec. Third (f), provides:

"When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

In practice this has been construed by the industry as requiring the filing with the National Mediation Board of all rules and regulations adopted under the Railway Labor Act governing the working conditions of employees, as well as formal agreements.

In addition, respondent attaches Exhibit IX which brings the case directly within the text of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 at p. 206. Exhibit IX which respondent asks the Court to take judicial notice of shows that May 19, 1949 the five operating unions and the three regional carriers' committees for the National Railroad Adjustment Board made an agreement to establish two supplemental boards of four men each to relieve the congestion of cases before the First Division, to take over any cases which might be assigned them by the First Division under the Railway Labor Act section 3 First (w), 45 U.S.C. Section 153 First (w). Labor representation on these two supplemental boards is

> (1) on the first supplemental board: the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen & Enginemen
>
> (2) on the second supplemental board: the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Since this dispute involves braking functions, the Negro trainporters would be sent to the second supplemental board. This brings the Steele case into play because

> "... the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. *Cf. Tumey* v. *Ohio*, 273 U.S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243" (loc. cited at p. 206).

It is respectfully submitted that rights under the Railway Labor Act, the due process clause of the Fifth Amendment to the Federal Constitution, and the Federal Civil Rights Act (8 U.S.C. sec. 41) would be sacrificed and obliterated if

the Negro head-end passenger brakemen (trainporters) had to submit their right to continue in their common calling and to continue to perform their present braking duties on the head-end of the Frisco's passenger trains to either the First Division or the supplemental boards. If such an imposition would not obliterate the constitutional and civil rights mentioned, then Negro operating employees must resign themselves to be eliminated from railroad service under abuse of government authority.

II. THE RIGHT TO WORK

A. The B.R.T. May Not Use Its Statutory Position and Power to Deprive Respondent of His Right to Work

Mr. Justice Field in *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 756-757, stated:

> "As in our intercourse with our fellowmen certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, . . .
>
> "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others. . . .
>
> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. . . .
>
> "It has been well said that, 'The property which every man has is his own labor, as it is the original

foundation of all other property, so it is the most sacred and inviolable. *The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.' . . .* Adam Smith's Wealth of Nations, Bk. I, Chap. 10." (Emphasis ours.)

See also: *Truax* v. *Raich, supra; Nord* v. *Griffin, supra.*

In *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251, this Court redeclared:

". . . The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

In *Central Metal Products Corporation* v. *O'Brien,* 278 Fed. 827, the court considered an application for a preliminary injunction directed against officers of a union who had threatened to call a strike on a certain project unless the plaintiff would discharge certain carpenters and hire others who were members of the sheet metal union. The court issued a temporary injunction and stated that the means resorted to to carry out the conspiracy were unlawful. It stated: ". . . it is settled law that one may not induce or persuade, *much less coerce,* one to break his contract with another."

Discriminations because of race or color in the area of governmental action have been declared to be based on irrelevant and invidious distinctions and have been stricken down as violating public policy, the Federal Civil

Rights Act and the due process clause of the Fifth or Fourteenth Amendments, dependent on whether the action was federal or state.

Steele v. *L. & N. R. Co.*, 323 U. S. 192;
Kerr v. *Pratt Library*, 149 F. 2d 212.

The principle of public policy against racial discriminations does not depend on the narrow issue of identity of craft or class but sweeps the entire range of governmental action in the broadest sense.

The fact that a statutory bargaining agent violates a fiduciary obligation in not fairly representing minority members of the craft is one point. We will deal with that elsewhere. But the graver sin is in the impairment by a governmental instrumentality of rights which not even Congress can legitimately abridge or deny.

Steele v. *L. & N. R. Co.*, *supra;*
Hurd v. *Hodge*, 334 U. S. 24, 92 L. ed. 1187;
Nixon v. *Condon*, 286 U. S. 73, 88, 89, 76 L. ed. 984, 990;
Smith v. *Allwright*, 321 U. S. 649, 662;
Kerr v. *Pratt Library*, *supra;*
James v. *Marinship Corp.*, 155 P. 2d 992 (Cal. App.);
Williams v. *International Boilermakers*, 165 P. 2d 212 (Cal. App.).

Respondent suggests to the Court that, apart from the question of class or craft, the collective bargaining representative may not use its federal statutory position and power to deprive citizens of the United States of their constitutionally protected right to work and, by a strike threat coerce an employer to discharge an employee solely because of his race or color.

Cf. Opinion of the Circ. Ct. of Appeals herein (R. 339, 345)

This Court held in the *Steele* case:

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body * * *" (323 U. S. 192, 202).

It is respectfully urged that when the representative exercises that power it exercises the power of Government and may not use it in violation of the Constitution, laws and public policy of the United States.

As an integral part of the statutory scheme for the regulation of commerce, Congress conferred upon labor unions broad legislative powers. Certainly it did not and, constitutionally, could not grant them unbridled freedom to bar citizens on the ground of their race or color from positions within the craft. To the extent that the representative participates in collective bargaining as a statutory representative under the Railway Labor Act, it exercises a power that is conferred, defined, regulated and protected by the statute; and would appear to be just as much a governmental agency as the Democratic Party of Texas, which was empowered by Texas statute to prescribe qualifications for membership, and which this Court held to be an agent of the State when exercising its State-conferred powers.

Nixon v. *Condon*, 286 U.S. 73 (1932)

This Court has also held that the action of a political party in conducting a primary election for either Congressmen or state officials is state action where that primary is an integral part of the state machinery for election.

Smith v. *Allwright*, 321 U.S. 649 (1944)

The actions of a labor organization in functioning as a collective bargaining representative under the Railway Labor Act should be no less governmental action where that function is an integral part of the Congressional scheme for the regulation of commerce.

B. The Right to Strike Is Not Absolute

The right of a labor union to strike is qualified. Interference without just cause with the right to carry on business is unlawful.

Dorchy v. *Kansas*, 272 U.S. 306

Whether a strike is lawful or not depends on its purpose as well as the means employed. It must be exercised with due regards to the rights of others.

See, Mason, "The Right to Strike," Univ. of Pennsylvania Law Review, Vol. 77, pp. 52, et seq.

It cannot be argued in good faith by petitioners that the coercion by the B.R.T. (even though not consummated in a strike because the carrier yielded to the strike threat) did not have for its object and purpose the displacement of the Negro workers and the substitution of white workers for them. Neither can they deny the realization of the inevitable result of their conduct nor deny their responsibility for its consequences.

Barr v. *Essex Trades Council*, 53 N. J. Eq., 101, 30 Atl. 881

Where there is both a legal and an illegal purpose, the action is illegal.

Bausch Machine Tool Co. v. *Hill*, 231 Mass. 30, 36

The racial aspects of petitioners' motivation contaminate whatever incidental or other motives which may have induced the B.R.T. to resort to strike threats.

> "Motive is a persuasive interpreter of equivocal conduct, and petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purposes." (Chief Justice Hughes in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 458.)
> See also: *Hunter* v. *A. T. & S. F. R. Co.*, 171 F. 2d 594, 597

In *Wills* v. *Restaurant Employees*, 26 Ohio N. P. (N.S.) 435 (1927), the court issued an injunction where a white union fostered a boycott of a restaurant employing Negro

waiters who were barred from membership in the union. In issuing the injunction the court recognized that it was not a case of mere unionism but one "of white men opposing colored men."

See also: *Bautista* v. *Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343

Every set of circumstances must be considered separately in determining whether a strike can be justified, and union ambition is not the sole standard. *Individuals* still have rights which courts have and will vindicate and protect against powerful economic combines using their statutory strength for illegitimate purposes; and, under the Constitution, one of the most sacred of these individual rights is the right to work.

III. THE NORRIS-LaGUARDIA ACT IS INAPPLICABLE

Petitioners urge for the first time[1] that the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Section 101, et seq., deprives the Federal Court of jurisdiction to award the injunctive relief granted by the Court below. Respondent submits that such a proposition is not only *incompatible with the purpose of the Act* but also flies in the face of controlling decisions of this Court. This Act constituted a great advancement for the cause of labor, but it would be a pyrrhic victory indeed if it should be construed to deprive employees of an injunctive remedy to avert irreparable injury caused by the violation of other rights conferred upon them by subsequent labor legislation or of civil rights protected by the Constitution. That no such anamolous construction should be indulged in is plain in principle and has been so declared by this Court.

[1] No hint to that effect was urged before the trial court, nor was the Petitioner an exceptor to the Order made therein, or a cross appellant.

Respondent has alleged that the Brotherhood and the Railroad had violated mandatory duties imposed upon them by the Railway Labor Act and interfered with a basic *personal* right to maintain the means of a legitimate livelihood. In the case of *Virginian Railway Co., supra,* this Court held that the Norris-LaGuardia Act does not apply to an injunction to enforce such rights, and that the mandatory provisions of the Railway Labor Act ". . . cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." (300 U. S. 515 at 563). In *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen, supra,* the union, as here, attempted to avoid the full effects of the *Steele* and *Tunstall* decisions, *supra,* by contending, as they do now, that the Norris-LaGuardia Act operates to restrain federal courts from issuing injunctions to enforce the obligation to represent all members of the craft fairly. However, this Court, in clear and unmistakable language, expressly held the provisions of the Norris-LaGuardia Act inapplicable to a suit for injunctive relief against discriminatory representation by the statutory bargaining agent. The following excerpt is particularly pertinent to the instant case:

> "Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation by which there would be taken from them their seniority and ultimately their jobs. Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If in spite of the *Virginian, Steele* and *Tunstall* cases (US) all *supra,* there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. The District Court has jurisdiction to enforce by injunction petitioners' rights to non-discrim-

inatory representation by their statutory representative." 338 U.S. 232 at 239.

Also see:

Brotherhood of Railroad Trainmen v. *Templeton*, 181 F. (2d) 527, 533;
Hunter v. *Atchison, Topeka & Santa Fe Ry. Co.*, 171 F. (2d) 594, 596;
M. K. T. Ry. Co. v. *Brotherhood of Ry. & S. S. Clerks*, 188 F. (2d) 302, 305.

IV. CONCLUSION

Mr. Justice Stone of this Court in *Virginian Railway Co.* v. *System Federation* No. 40, 300 U.S. 515, 551, states:

> "The extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the Court."

Respondent submits that the decision of the Circuit Court of Appeals is founded on reason and established law and that the result reached protects the rights of all parties. There was ample factual bases to justify the result reached although the decision could well have been to the same effect for other and additional reasons such as have been presented in this brief.

The informed judgment of the Circuit Court of Appeals, exercised with a view of all relevant circumstances, and based upon the particular facts and their analysis, is entitled to great weight; and except for strong and impelling reasons this Court will not interfere with its actions.

Meccana v. *Wanamaker*, 253 U.S. 136, 64 L. Ed. 822.

The abuse of federal statutory power and disregard of statutory obligation by the B. R. T. in this case and the use of its position to discriminate against Negro railway workers, solely because of their race or color, cannot be ignored.

A decision from this Court upholding the result reached by the Circuit Court of Appeals will give strength and courage to individual workers everywhere, arising from the knowledge that their rights to a livelihood are protected by Courts from unfair and discriminatory conduct based on race.

Respectfully submitted,

VICTOR PACKMAN
JOSEPH C. WADDY
Counsel for Respondents

HENRY D. ESPY,
WILLIAM C. GARDNER,
Of Counsel.

APPENDIX

APPENDIX

EXHIBIT I (R. 59-61)

Morey Exhibit A

Memorandum of Understanding of Responsibility for and Duties Under an Agreement Made Between the Four Train Service Organizations and the St. Louis-San Francisco Railway Company

The four train service organizations have insisted and demanded for several years that St. Louis-San Francisco Railway Company have an understanding with them that in the future the Company would not employ any more Negroes in train, engine and yard service, but not including train porters. This demand and request upon the part of the organizations has been based upon the allegation that colored firemen under arrangements prevent and make almost impossible opportunity for the training of white firemen to become engineers and limit their opporunities so to do; that colored employes cannot render the intelligent service necessary to safe operation in train, engine and yard service; that constant friction and irritation arises out of the whole situation and various other reasons.

The Railway Company has made known to the Organizations their very real apprehension and fears that in the event such an agreement was made the Negroes in train, engine and yard service now in the employ of the Company, would be either intimidated, threatened or coerced into abandoning their positions or through indirect methods of false charges, repeated complaints, alleged infractions of rules, etc., would be driven from the service of the Company.

The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations. The four train service organizations acknowledge and fully recognize the right of Negroes now in the employ of the Company to the positions to which they are entitled under schedule rules and their right to fill these positions under fair and honest conditions without unfair action of any character being taken by the members of those organizations directly or indirectly for the purpose of compelling the abandoning of these positions or their elimination from employment. The four train service organizations undertake that they can and will see to it that neither by nor

through their membership is any advantage taken of this agreement in order to compel the abandonment of the positions now held by Negro employes; that on the contrary, realizing the position of the management and their own assumption of responsibility, they will put forth every effort to see that conditions feared by the management shall not occur. It is the good faith of all parties that the present Negro employes shall have fair and equal rights to remain in their positions, subject, of course, to the same measures of discipline and entitled to same impartiality of dealing.

Both parties shall co-operate together and use their best endeavors to carry this agreement into effect. In event that a situation shall arise which demonstrates lack of safety for colored employes or of unfair dealings with them this matter shall promptly be taken up with the train service organizations for the purpose of prompt and efficient prevention and correction. If it can be fairly shown thereafter that such conditions continue to exist then the Management reserves the right to hold itself released from the understanding entered into.

In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employes in train, engine and yard service but not including train porters, only white men shall be employed.

(Sgd) J. W. BOWLER
General Chairman, B. of L. E.

(Sgd) E. H. KRUSE
Ass't Grand Chief Engineer, B. L. E.

(Sgd) OTIS EMBRY
General Chairman, B. of L. F. & E.

(Sgd) FRED W. LEWIS
Vice President, B. of L. F. & E.

(Sgd) L. S. THOMPSON
General Chairman, O. R. C.

(Sgd) J. A. GANNON
Vice President, O. R. C.

(Sgd) F. W. MOREY
General Chairman B. of R. T.

(Sgd) S. R. HARVEY
Vice President, B. of R. T.

(Sgd) J. E. HUTCHISON
Vice President—St. Louis & San Francisco Ry.

Witness—March 14, 1928.

EDWIN P. MORROW
Member Board of Mediation

EXHIBIT II (R. 107-108)

(Plaintiff's Exhibit 22.)*

"I hand you herewith copy of agreement made with the organizations relative to Case No. 5, which has to do with employment of Negroes as firemen, brakemen and switchmen on the lines south of Memphis.

This agreement was dictated by Federal Mediator Morrow and as you will note it is signed by everybody concerned.

This means that we must not hire any more Negro employes. These that are with us are to stay, but when we need new men we will hire white men.

You should not give this any publicity at all. You should just simply call in your men who are charged with this duty and tell them what they are to do and whenever there is a change in officers that employ men in that territory they must be very carefully instructed. There must be no failure to carry out this matter.

If there might have been any Negroes employed in these capacities on yesterday, March 14th, today, March 15th, or any day up to the time that you can get these instructions out, such employes should be dispensed with.

I want to carry this out in good faith and then we want to see that the men carry out their agreement with us in good faith. If there is any attempt to intimidate, terrorize, or in any way get rid of these employes, we should be advised quickly so that we can take proper action.

Wish you would give me your personal acknowledgment and I wish you would personally see that instructions in this matter are very carefully carried out. This is something that can be handled successfully if we go about it in the right way or it can result in very bad state of affairs if it is handled without discretion.

(Signed) J. E. HUTCHISON."

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* Letter dated March 15, 1928, to F. H. Shaffer, general manager, and H. L. Worman, superintendent of motive power, from J. E. Hutchison, vice president of St. Louis, San Francisco Railway Co.

EXHIBIT III

Memorandum on Discriminations Against Negro Railway Workers by Brotherhood of Railroad Trainmen *

1883.—The Brotherhood of Railroad Trainmen was organized in 1883 as the Brotherhood of Railroad Brakemen of the Western Hemisphere, and so continued until 1886.

1884.—The first annual convention of the organization in 1884 adopted a constitutional provision restricting membership to "whites" only.

1886.—From 1886 to 1889 the organization was known as the Brotherhood of Railroad Brakemen.

1890.—The present name of the organization: Brotherhood of Railroad Trainmen was adopted in 1890.

The Brotherhood of Railroad Trainmen by constitution still exclude Negroes from membership in all Southern States.

1898.—In 1898 Grand Master Morrissey and the General Grievance Committee, Brotherhood of Railroad Trainmen, on the entire Missouri Pacific System met management of the system in an effort to effect the removal of the Negro brakemen on the entire system (Proceedings, Fourth Biennial Convention, 1899, p. 19).

1899.—In 1899 the general grievance committee of the Brotherhood of Railroad Trainmen, together with A. B. Youngson of the Brotherhood of Locomotive Engineers, F. P. Sargent of the Brotherhood of Locomotive Firemen and Enginemen, E. C. Clark of the Order of Railway Conductors, and W. V. Powell of the Order of Railroad Telegraphers and the committees of the five organizations negotiated an agreement with the Gulf, Colorado and Santa Fe Railway on displacing colored porters on passenger trains and white brakemen being placed in these positions (Report

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* Reprint from Hearing before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 81st Congress, on H. R. 4453 and companion bills to prohibit discrimination in employment, etc., pp. 214-217. Hearings held May, 1949.

of Grand Master Morrissey, Fifth Biennial Convention, Milwaukee, 1901, p. 10).

1899.—The Fourth Biennial Convention of the Brotherhood of Railroad Trainmen at New Orleans, 1899, commended Grand Master Morrissey's efforts in 1898 to have Negro brakemen replaced by whites in certain railroads (proceedings, pp. 19 and 72).

1899.—The Fourth Biennial Convention above protested the employment of Negroes on all railway trains and requested the Order of Railway Conductors, Brotherhood of Locomotive Firemen, Brotherhood of Locomotive Engineers and the Order of Railroad Telegraphers to give their support toward clearing the lines of Negro workmen (proceedings, pp. 59-60).

1901.—Second Vice Grand Master Dodge reported to the Fifth Biennial Convention at Milwaukee, 1901, that some of the lodges have succeeded, to a great extent, in having the Negro taken off trains, and the men of the South are using their utmost efforts to have the Negro taken from the service (proceedings, p. 12).

1905.—In 1905 the Brotherhood of Railroad Trainmen committee negotiated an agreement with the Norfolk & Western R. Co. that no more Negroes would be hired as brakemen for road service.

1910.—July 2, 1910, the Brotherhood of Railroad Trainmen and Order of Railway Conductors Southern Association of General Committees negotiated the "Washington agreement with the Southern Railway Co., Atlantic Coast Line R. Co., Seaboard Air Line R. Co., and other southern roads providing that Negroes were not to be employed as baggagemen, flagmen, or yard foremen; where Negroes held such positions at the time of making the contract, any vacancies in such position should be filled by whites (report of Vice President Val Fitzpatrick, 10th biennial convention, Harrisburg, 1911; pp. 445-449).

1911.—The tenth biennial convention, Brotherhood of

Railroad Trainmen, at Harrisburg, Pa., 1911, adopted a resolution that railroads should employ only promotable men in train and yard service (proceedings, pp. 175-176).

1911—The Brotherhood of Railroad Trainmen committee February 2, 1911, negotiated an agreement with the Florida East Coast R. Co. that no more Negroes would be employed in train or yard service, pursuant to contract effective November 1, 1910 (report of President Lee, 11th biennial convention, San Francisco, 1913, p. 25).

1911.—The Brotherhood of Railroad Trainmen committee March 15, 1911, negotiated an agreement that no more Negroes were to be employed as yard conductors, baggagemen, or flagmen, and the percentage of Negro train or yardmen employed should not exceed the percentage in service July 1, 1910 (report of Vice President Fitzpatrick, 11th biennial convention, pp. 117-118).

1911.—The Southern Association of General Committees of the Order of Railway Conductors and Brotherhood of Railroad Trainmen June 30, 1911, negotiated an agreement with Cincinnati, N. O. & Texas Pacific and Alabama Great Southern Ry.; Central of Georgia; Mobile & Ohio and Southern Ry. of Mississippi; Georgia, Southern & Florida R.; New Orleans & Northeastern, Alabama & Vicksburg, Ry., and Vicksburg, Shreveport & Pacific Ry.; Southern Ry. and Virginia & Southwestern Ry.; Atlantic Coast Line, that when Negroes who perform work as flagmen, or Negro foremen become separated from the service, their places would be filled by white men (report of President Lee, 11th biennial convention, pp. 50-54).

1913.—The Brotherhood of Railroad Trainmen committee negotiated an agreement with the Norfolk Southern Ry. Co. February 1913, that the percentage of colored trainmen will not be increased (report of Vice President Val Fitzpatrick for 1913, p. 204).

1914.—The general committee of the Brotherhood of Railroad Trainmen in 1914 was able to displace 14 Negro brake-

men with white brakemen on the Gulf, Colorado & Santa Fe Railway (circular of instructions, C-13, August 1914, Railroad Trainmen's magazine, September 1914, p. 831).

1914. The Brotherhood of Railroad Trainmen committee was successful in 1914 in placing 13 white flagmen on passenger runs on the St. Louis-San Francisco, displacing Negroes (report of President Lee for 1914, p. 541; St. Louis-San Francisco Railroad—file 5332).

1914.—On or about May 15, 1914, Val Fitzpatrick, vice president and national legislative representative, B. R. T., joined with P. J. McNamara, vice president, B. of L. F. & E., H. W. Wills, assistant grand chief engineer, B. L. E., and W. M. Clark, vice president, Order of Railway Conductors in writing the letter to Col. George W. Goethals set out in full as exhibit 1 hereto attached (Report on National Legislation, 63d Cong., 1914, by the national legislative representatives of the B. L. E. of L. F. & E., O. R. C. and B. R. T., December 1, 1914, to their organizations).

1915.—The general grievance committee, Brotherhood of Railroad Trainmen, for the Georgia Southern & Florida Railway, February 1915, although there was no breach of article 1 of the Washington agreement, secured the displacement of six Negro brakemen and replaced them with white brakemen. (Report of assistant to the president, T. R. Dodge, officers reports for 1915, p. 1135; Railroad Trainmen's Magazine, March 1915, p. 292.)

1915.—Assistant to the president, T. R. Dodge, Brotherhood of Railroad Trainmen, in conjunction with Vice President Turner, Order of Railway Conductors, met in 1915 with the joint general committees for the Cleveland, Cincinnati, Chicago & St. Louis Railway, and negotiated with management with result five colored trainmen on Chicago and St. Louis divisions were removed and white trainmen put in their positions. (Circular of Instruction C-28, November 1915; Railroad Trainmen's Magazine, December 1915, p. 1140.)

1916.—The First Triennial Convention, Brotherhood of Railroad Trainmen, at Detroit, Mich., in 1916, adopted a resolution instructing the general chairmen on the Southeastern territory to use every means of the brotherhood to get white men the right to work on the front end (proceedings, p. 95).

1917.—An editorial in Railroad Trainmen's Magazine (October 1917, pp. 733-734) commended the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen for resisting the efforts of the Baltimore & Ohio to hire Negro firemen during the war emergency.

1917.—The Brotherhood of Railroad Trainmen committee, together with the committees of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Order of Railway Conductors, obtained the assignment of three white brakemen to a dodger crew on the Texas & Pacific Railway (file 6429) formerly manned by Negro brakemen (Circular of Instructions D-14, September 1917; Railroad Trainmen's Magazine, October 1917, p. 727.

1917.—The general grievance committee, Brotherhood of Railroad Trainmen, for Seaboard Air Line Railway (file 6642) negotiated an agreement with the carrier in 1917 restricting the employment of Negro trainmen when normal conditions prevail.

1919.—The Second Triennial Convention, Brotherhood of Railroad Trainmen, at Columbus, Ohio, in 1919, adopted a resolution calling for all general committees to incorporate into the schedule on each line of railroad a rule that no more non-promotable men will be employed; and that the practice of using train porters to perform the duties of baggagemen, flagmen, or brakemen be discontinued (proceedings, pp. 229-230).

1919.—The second triennial convention above adopted a resolution demanding that the Director General of Railroads

restore the right of the Brotherhood of Railroad Trainmen "to make percentage agreements guaranteeing the Brotherhood of Railroad Trainmen a majority of men so employed, to the end that contracts made by this organization may be protected by it" (proceedings, p. 315).

1919.—In July, 1919, the Brotherhood of Railroad Trainmen advised Regional Director Winchell it was the desire of the Brotherhood to execute an agreement that would operate to prevent the employment of Negroes in train and yard service (proceedings, second triennial convention, 1922, pp. 172-175).

1919.—On March 1, 1919, the general committee, Brotherhood of Railroad Trainmen, Southern Railroad negotiated an agreement for removal of all Negro foremen in yard service at Chattanooga (report of President Lee for 1919, p. 73, Railroad Trainmen Magazine, May, 1919, p. 356).

1920.—The general grievance committee, Brotherhood of Railroad Trainmen, for Norfolk & Portsmouth Belt Line Railroad, April 2 and 3, 1920, negotiated an agreement reducing the employment of Negro trainmen from 33 percent to 30 percent, which protected the positions then held by white trainmen (report of President Lee for 1920, p. 106).

1928.—The Brotherhood of Railroad Trainmen did not give the Negro firemen or trainmen on the St. Louis-San Francisco Railway or its predecessor corporations property any notice or opportunity to be heard at any stage of the negotiations which resulted in the contract of March 14, 1928, prohibiting future hiring of Negroes in train, engine or yard service.

1943.—The Brotherhood of Railroad Trainmen general grievance committee on the St. Louis-San Francisco Railroad Co. through its chairman protested the proposal of the carrier to hire Negro trainmen during World War II, as a breach of the March 14, 1928, agreement.

* * * * * * * * * * *

1931.—The Sixth Triennial Convention, Brotherhood of

Railroad Trainmen, at Houston, Tex., 1931, adopted a resolution empowering the president of the grand lodge to assign a grand lodge officer to assist the general committees in an effort to have the Negro train porters removed (proceedings, pp 632-633).

1940 to date.—In the 1940's the Brotherhood of Railroad Trainmen has been conducting a drive on the Southwestern railroads (Missouri Pacific, M-K-T; Atchison, Topeka & Santa Fe; St. Louis-San Francisco Railway) to take away from Negroes classified as "train porters" all the head-end braking work on passenger trains which they have been doing with BRT knowledge for more than 40 years and have this head-end braking work taken over by white brakemen (most of whom are BRT members).

EXHIBIT IV (R. 110)

(Plaintiff's Exhibit 27.)

"Returning enclosures received with your personal April 12th relative to letter addressed to Mr. Kurn signed by Limit Brown, Jim Judge and Abe Smith, Memphis.

These men are all colored brakemen on the Southern Division south of Memphis and they have reference to the proposition of our not hiring any more colored trainmen, except train porters.

We, of course, put out our information in connection with this matter very quietly, but apparently the Chairmen published the information as soon as they got back to their divisions, and a delegation of colored brakemen called on Superintendent Butler, who told them there would be no change in the method of handling those who are now employed and nothing whatever would interfere with their future employment so long as they performed their work in a satisfactory manner.

Mr. Sisson also talked to a couple of the colored firemen

and they had about the same complaint, however, he told them there would be no change in the method of handling them, except that no new colored men would be employed.

(Signed) F. H. SHAFFER,
General Manager."

EXHIBIT V (R. 111)

Mr. Packman: I will read the letter, date of 4/14/1928. (Plaintiff's Exhibit 25.)

"Mr. J. E. Hutchinson. Vice President of St. L. and SF R.R.

Dear Sir:

We the undersigned Colored freight brakemen are the humble and submissive voices of the colored brakemen of the Tupelo and Birmingham Sub. Div. wish to petition your *majesty* to meet you in a conference to ascertain why and what accusations you have against us and our posterity to cast us off in old age after serving you most faithfully for over a decade and almost half our lives.

Dear Mr. Hutchinson, If it be possible for us to remedy such an accusation we are more than willing to do all there is in our power to remove the obstacles which hinder the free and embarrassed actions of those about us, thanking you in advance for any consideration you may give us, we beg to remain your servants for ever.

'LIMIT BROWN,' Gen. Chr. 17 yrs. service.

'ABE SMITH.'"

EXHIBIT VI (R. 112)

Mr. Packman: Another letter from Mr. J. E. Hutchison under date of April 19, 1928, our Exhibit No. 28. I am reading now.

(Plaintiff's Exhibit 28.)

"Limit Brown,
1295 Edith Street,
Memphis, Tenn.

I have your letter of April 14th.

It has been decided that we will not employ any more colored men as brakemen, switchmen, or firemen. All of the colored men that now hold these places will be retained in these places as long as they live or are able to do the work and comply with the rules, but as they drop out from natural causes they will be replaced with white men."

EXHIBIT VII (R. 112-113)

(Plaintiff's Exhibit 29.)

"Mr. J. E. Hutchison,
Vice-President, St. L. & SF. R. R.

Dear Sir:

After much prayerfull consideration with reference to your letter of Apr. 19, we read with much regret that decision outlined in your first sentence. There are many things to be regreted in this decision, one which we would like to call to your attention to.

First of all there is reasonable ground for your local officials to lose interest in us, because in the first place they feel you have: which will make it very difficult for us to stay in the services. However, We are grateful to know that we will be retained as outlined in sentence two. But: Dear Mr. Hutchison, the first and last sentences so far out-

weigh, sentence two, untill it leaves our hearts in pain. We know that we cannot compete with the powers that be. We would far more rather you to have deducted our salaries than to eliminated us from the employment of this great industry.

Therefore Mr. Hutchison, if it be possible and pleases you our only human salvation, We are humbly asking you, please do not close this great industrial door in the black man's face who is the least of all the inhabitants of the earth. We are thanking you in advance for any consideration you may give us because we are depending absolutely upon you for our restoration. We will be pleased with whatever you do to restore us. Because we believe as thou art a husband and father, you will do justice for us.

We beg to remain your servants as ever.

Yours Respectfully,

'LIMIT BROWN, BK.man.'"

EXHIBIT VIII

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

NATIONAL MEDIATION BOARD
WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copy of document described as follows:

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

is a true and complete copy of the original rules which are on file in the office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

(s) T. E. BICKERS
THOMAS E. BICKERS, Secretary.

COPY

Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board Provided for in the Amended Railway Labor Act, Effective June 21, 1934.

Pursuant to instructions your committee submits the following as its report and recommendations in respect to the rules under which the labor members of the National Railroad Adjustment Board, created by the Railway Labor Act as amended June 21, 1934, shall be selected:

Our investigation discloses that the following national labor organizations were organized in accordance with the provision of Section 2 of the Railway Labor Act as amended and are the qualified organizations to participate in the making of rules and the selection of the labor members of the adjustment board. We have grouped these organizations in conformity with the several divisions of the adjustment board as defined in the Act as amended:

Division 1—Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Order of Railway Conductors
Brotherhood of Railroad Trainmen
Switchmen's Union of North America

Division 2—International Association of Machinists
International Brotherhood of Boilermakers Iron Ship Builders and Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Assn.
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers

Division 3—The Order of Railroad Telegraphers
American Train Dispatchers' Association
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees
Brotherhood of Railroad Signalmen of America
Order of Sleeping Car Conductors
International Brotherhood of Teamsters, Chauffeurs & Stablemen of America

Division 4—National Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Assn.
International Longshoremen's Association
International Seamen's Union of America

(1) Nominees for membership on each division of the adjustment board shall be restricted to the organizations representing employees in said division and no organization shall be permitted to nominate more than one candidate for membership thereon. Such nominations shall be made through the chief executive of each of said organizations or such other medium as each organization shall desig-

nate; provided, however, that when the number of qualified organizations representing the employees embraced in any division of the adjustment board are equal to the number of labor members on that division, then each such organization acting through its chief executive or other medium designated by the organization shall appoint one member to that division of the board.

(2) Except as provided in the preceding paragraph, each nominee for membership on the National Adjustment Board shall be qualified to serve on said board when confirmed by a majority of all the qualified organizations, each acting through its chief executive or other medium designated by the organization; each qualified organization being entitled to one vote.

(3) In the case of a permanent or temporary vacancy on the adjustment board, such vacancy shall be filled by selection in the same manner as in the original selection.

(4) These rules may be revised at any time by a majority of the qualified organizations.

The above rules were adopted at Chicago, Ill., June 29, 1934.

EXHIBIT IX

Memorandum dated May 9, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division.

NATIONAL MEDIATION BOARD
WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copies of Memoranda dated May 19, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board (1) setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division, and (2)* recommending certain changes in rules of the First Division with respect to ex parte submissions, are true and complete copies of the original memoranda which are on file in the Office of the National Mediation Board, which is a pub' office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

(s) T. E. BICKERS
THOMAS E. BICKERS, Secretary

* No. 2 omitted here as irrelevant.

COPY 5/19/49

MEMORANDUM

The chief executive officers of the five operating organizations and the three regional carriers' committees for the National Railroad Adjustment Board are agreed on the following procedure:

Two supplemental boards of four men each will be set up under the provisions of Section 3 First (w) of the Railway Labor Act with authority to handle cases now on the docket of the First Division of the National Railroad Adjustment Board, assigned to them by such First Division, and such additional cases as may be assigned to them by such Division, as hereafter provided. One board shall consist of one representative each appointed by the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, and two representatives appointed by the Carriers. The other board shall consist of one representative each appointed by the Order of Railway Conductors and Brotherhood of Railroad Trainmen, and two representatives appointed by the Carriers.

It is understood that the members on such boards may be changed from time to time. Representatives from any railroad involved in cases assigned to such boards may be appointed as board members to handle cases coming from that railroad and members may be changed from time to time as the cases involve different railroads.

Initially, in assigning cases to such supplemental boards, the First Division shall assign cases which have not been certified for appointment of a referee involving any railroad system where ten or more cases are on the docket as of the date of the appointment of such supplemental boards, involving employes represented by either or both of the Organizations on each board respectively. Example: If the "A" railroad has seven cases involving the B of L E and four cases involving the B of L F & E they will be assigned to the supplemental board on which representatives of those two organizations serve. The same example is applicable to the O R C and B of R T.

Thereafter, from time to time the First Division shall assign to such supplemental boards cases involving a railroad system whenever ten or more cases are docketed, in the same manner as described in the preceding paragraph.

Cases where the interest of an organization not represented on such supplemental board is asserted by either party or by a member of the First Division, shall be retained by the First Division and shall not be assigned to such supplemental board.

It is agreed that such supplemental boards shall be established for a period of one year, and thereafter subject to termination upon request of the chief executive officers of the five operating organizations or the three regional carrier committees upon ninety days' notice.

(s) A. JOHNSTON,
Grand Chief Engineer, Brotherhood of Locomotive Engineers

(s) D. B. ROBERTSON,
International President, Brotherhood of Locomotive Firemen and Enginemen

(s) H. W. FRASER (ROH),
President, Order of Railway Conductors

(s) D. M. MacKENZIE,
Assistant President, Brotherhood of Railroad Trainmen

(s) A. J. GLOVER,
President, Switchmen's Union of North America

(s) H. A. ENOCHS,
Chairman, Eastern Committee for the National Railroad Adjustment Board

(s) D. P. LOOMIS,
Chairman, Western Committee for the National Railroad Adjustment Board

(s) G. A. MACKAY,
Chairman, Southeastern Committee for the National Adjustment Board

Witness: (s) FRANCIS A. O'NEILL, JR.,
Chairman, National Mediation Board